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The Supreme Court of the United States, in the case of Plumley v. The Commonwealth of Massachusetts, has recently affirmed the constitutionality of a Massachusetts statute which prohibits the selling of any substance compounded in whole or in part of fats, oils or any oleaginous material not produced from milk or cream "which shall be in imitation of yellow butter." There is nothing in the law implying that this is an unwholesome article of food. If the thing is in imitation of yellow butter, not of white butter, it must not be sold. A majority of the court hold that the statute, in its application to sales of oleomargarine brought into Massachusetts from other States, is not in conflict with the clause of the constitution of the United States investing congress with the power to regulate commerce among the several States. The court distinguished the following cases which were cited in argument to support the contention that the grant of power to congress to regulate interstate commerce extended to such legislation as that enacted by the commonwealth of Massachusetts, viz: Railroad Co. v. Husen, 95 U. S. 465; Minnesota v. Barber, 136 U. S. 313; Brimmer v. Rebman, 138 U. S. 78; Walling v. Michigan, 116 U. S. 446. The court found authority for its conclusion in the following cases, viz: People v. Arenburg, 105 N. Y. 123; McAllister v. State, 72 Md. 390; Waterbury v. Newton, 21 Vroom, 534; State v. Marshall, 64 N. H. 549; State v. Addington, 77 Mo. 110. The court thus summarizes its views: "We are of opinion that it is within the power of a State to exclude from its market any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the States are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national constitution, and without infringing the authority of the general government. A State enactment, forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States." Chief Justice Fuller and Justices Field and Brewer do not concur with the majority. A dissenting opinion is filed by the chief justice, maintaining that the law in question must be construed according to its natural and reasonable effect, as an attempt to regulate trade between the States, which is the prerogative of congress solely. As the law in question does not put the prohibition on the ground of public health, but merely on the ground that the article looks like butter, the view of the majority of the court would sustain any State law which prohibits the sale of things on the score of their appearance. Thus the importation of worsteds might be prohibited because they look like woolens, or the sale of oak if it looks like walnut, or of steel if it looks like iron. We confess to a decided leaning in the direction of the contention of the dissenting judges.

A decision recently rendered by Vice Chancellor Green of New Jersey restrains a labor organization from distributing any circulars or publications containing appeals or threats against the publication of a newspaper or from interfering with the business of the paper or intimidating dealers or advertisers. The Vice Chancellor takes the ground that a person's business is properly entitled, under the constitution, to protection from unlawful interference; that every person has a right as between his fellow-citizen and himself to carry on his business within legal limits according to his own discretion and choice with any means which are safe and healthful and to employ therein such persons as he may select; that every other person is subject to the correlative duty arising therefrom to refrain

from any obstruction of this right which can be made compatible with the exercise of similar rights by others and that injury to the business of another is malicious and actionable if done intentionally and without legal excuse.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS — APPEAL FROM STATE COURT — FEDERAL QUESTION.—In Lloyd v. Mathews, decided by the United States Supreme Court, it was held that where in an action in a State court the parties plead and claim rights under statutes of a foreign State, but the defeated party does not plead the construction given such statutes by the courts of such foreign State, or put in evidence the laws or printed books of the adjudged cases of such State, or prove the common law of such State by the parol evidence of persons learned in that law, as required by the law of the State where the action is tried, such party cannot appeal from the highest court of the latter State to the Supreme Court of the United States, on the ground that the State court did not give full faith and credit to the public acts, records and judicial proceedings, of such foreign State as required by the constitution and law of the United States. The court said:

The federal question upon which plaintiff relies to sustain our jurisdiction is that, under the statutory law of Ohio set out in his pleading, the transfer of the stock in question was void, and that the court of appeals of Kentucky in rendering judgment did not give that full faith and credit to the public acts, records and judicial proceedings of the State of Ohio which the constitution and the law of the United States require. Const. art. 4, sec. 1, Rev. St. sec. 905.

The first error assigned is as follows: "The court of appeals of Kentucky erred in the decision rendered in this case below, in failing to give full faith and credit to the laws of the State of Ohio which were presented in the pleadings, in failing to give full faith and credit to the judicial construction of such laws by the highest court of said State, and in failing to give full faith and credit to the judicial proceedings of the Probate Court of Hamilton County, Ohio, as set forth in the pleadings."

We do not find that the record contains any judicial proceedings of the Probate Court of Hamilton County, Ohio, but suppose the reference to be to proceedings in insolvency upon the filing of the deed of assignment by Harper, under which Lloyd, trustee, claims, and that such insolvency proceedings could have no greater effect on the question of title than allowed by the laws of Ohio in the matter of the preference of creditors.

The court of appeals of Kentucky held that, as the parties all resided in Ohio and the entire transaction occurred there, its validity was to be tested by the law in force there; that at common law a debtor had a right to prefer a creditor, either by payment or an express preference in a deed of assignment; that he had a right to pay his debt, and it was only by virtue of statutory law that such a payment could be held invalid, and the creditor be compelled to surrender his advantage; that in the absence of any showing of the existence of such a statute in another State, it must be presumed that the common law was in force there; that section 6343 of the Revised Statutes of Ohio, set out in the pleadings, did not appear "to embrace a case like this one, but to relate alone to preferences made in deeds of assignment to trustees for creditors generally;" that this transfer could not properly be held to be a part of the deed of assignment; and that, tested by the rules of the common law, the preference was not invalid.

Now, in arriving at these conclusions, the court of appeals did not concur with the views of Harper's assignee; but does it therefore follow that full faith and credit was denied to the laws of Ohio and to the construction of such laws by the highest court of that State? The courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States; but in the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the State court, whose judgment or decree is under review, is matter of fact there. And whenever a court of one State is required to ascertain what effect a public act of another State has in that State, the law of such other State must be proved as a fact. Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. Rep. 398; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242.

The court of appeals was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of that State by the parol evidence of persons learned in that law, or to put in evidence the laws of that State as printed under the authority thereof, or a certified copy thereof, as provided by the law of Kentucky, Gen. St. Ky., 1888, ch. 37, secs. 17, 19, pp. 546, 547.

The court of appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that under such circumstances, where the validity of a State law is not drawn in question, but merely its construction, no federal question arises. As was remarked in Glenn v. Garth, 147 U. S. 360, 368, 13 Sup. Ct. Rep. 350: "If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect it would follow that the State courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated." Banking Co. v. Marshall, 12 How. 165; Cook Co. v. Calumet & C. Canal & Dock Co., 138 U. S. 635, 11 Sup. Ct. Rep. 435.

This record contains nothing to show as matter of fact that the public acts of Ohio had by law or usage in Ohio any other effect than was given them by the court of appeals of Kentucky.

MECHANIC'S LIEN — PROPERTY HELD FOR PUBLIC USE—FRANCHISE OF WATER COMPANY. —The Supreme Court of Wisconsin decide in Chapman Valve Manuf'g Co. v. Oconto Water Co., 60 N. W. Rep. 1004, that a mechanic's lien, on the ground of public policy, does not extend to the "valves" constituting a part of the water-works of a corporation organized to furnish a city with water and that for the same reason the lien does not extend to the "plant" of such water-works company, since, as the statute does not extend the lien to a "franchise" the purchaser of the plant would be without authority to continue the operation of the plant. The court said:

The instant case is an action for a statutory lien upon the entire water-works plant of the defendant, or, if that is denied, upon the valves furnished by the plaintiff, as machinery which may be removed. In Wilkinson v. Hoffman, 61 Wis. 637, 21 N. W. Rep. 816, this court held, on grounds of public policy and convenience, that a mechanic's lien was not given by section 3314, Rev. St., against machinery placed in a building which was a part of a water-works plant, owned by a city, and held for public use. It was said that: "The public inconvenience which would result from having such machinery removed is too obvious and grave to require any discussion. The comfort, health, safety, and property of the citizens would be greatly endangered by allowing the facilities for procuring water to be suspended, even for a short period. In view of the serious consequences which would result by allowing the lien to attach to machinery thus used, and which more than countervails any private advantage, we are inclined to hold that the provision does not apply in the case before us." And so the court held, "on grounds of public necessity and convenience," that a lien was not given by the statute on property so held for public use. The city of Oconto has provided for the supply of the water necessary for its protection against fire, and for all the uses of its citizens, by a contract with the defendant, which is a corporation specially organized for that purpose, for the term of 30 years. The defendant's system of water-works was constructed under an ordinance of the city, which directed, in considerable detail, the manner of its construction, extent and capacity of the plant, and the manner of its operation. It also gave it a franchise to construct and operate its work for 30 years. After the plant was completed, the city accepted it by an ordinance which declared it to be constructed in accordance with the ordinance and the franchise conferred. In this manner the city provided itself with a system of water-works for the protection and convenience of its inhabitants. It became and was the water-works of the city of Oconto. It is manifest that the inconvenience and danger which must result from a stoppage of the operation of the water-works, or of any interference with their use and operation, to the city and to its inhabitants, would be equally grave and important whether the system was owned and operated by the city or whether the city owned only the right to have it operated for its benefit and for the benefit and protection of its citizens. The effect of enforcing a lien upon the valves, as machinery which might be removed, would be to dismantle the plant, and stop its operation, for a time at least, and to deprive the city and its inhabitants of its protection and use in either case. So the case comes within the rule of Wilkinson v. Hoffman, *supra*, and the lien upon the valves must be denied. To extend the lien over the entire plant would bring a like mischief and inconvenience. The lien could, by the terms of the statute, extend only to and include the entire plant, with all the interest which the defendant has in the land on which the plant is situated. The statute, in terms, gives no more. The defendant has an oral contract with the city for the purchase of the lots on which its pumping works stand, and the franchise to lay its main pipes and hydrants in the streets. It has no other or further interest in the land. Perhaps this is a sufficient interest to support a lien, in an ordinary case, upon the plant, with the interest in the land. But in terms the statute gives no more. It gives no lien upon or right to sell the franchise to operate the works. Whether the statute shall be extended by construction to cases not within its express terms may depend somewhat on its subject-matter as related to questions of public policy and convenience. The effect and consequences which may result from an enlarged construction of the statute may be considered in determining its proper construction. If it shall be held that the plaintiff has a lien which covers the plant, then the plant may be sold to satisfy the lien. It will then come to a purchaser who has no franchise to operate it, for the statute does not give a lien upon the franchise. Nor does it provide that the franchise shall follow the plant on sale under a lien judgment. Nor does the franchise follow the plant by force of the rule that the incident follows its principal. If that maxim has any application, it should be considered that the franchise is the principal thing. All other rights springs from the franchise. The franchise is a grant in gross of an incorporeal hereditament, and is not appurtenant to any particular land or property. Fond du Lac Water Co. v. City of Fond du Lac, 82 Wis. 322, 52 N. W. Rep. 439. It would not follow the plant on sale under a lien judgment. It is neither subject to the lien, by provision of the statute, nor follows the plant on sale as an incident follows its principal. It is not appurtenant to the plant. Nor can the plant be sold separately from the franchise to operate it. The franchises and corporate rights of a company, and the means vested in them, which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away or transferred by any act of the company itself, or by any adverse process against it, unless it is authorized by statute. Yellow River Imp. Co. v. Wood Co., 81 Wis. 554, 51 N. W. Rep. 1004; Foster v. Fowler, 60 Pa. St. 27; 8 Am. & Eng. Enc. Law, 643, and cases cited in notes. To sell the plant to a purchaser who had no franchise to operate it would work all the public mischief and inconvenience which its total destruction would cause. Besides, a sale of the plant separate from the franchise would be a delusive remedy to the plaintiff. The plant without the franchise is practically without value, a consideration which shows that that cannot be the plaintiff's remedy. Nor has a court of equity power to extend the lien over rights not made subject to it by the statute. So it must be held that no mechanic's lien is given by the statute upon a water-works plant which a city has provided for the protection and convenience of its citizens by a contract with a corporation organized for that purpose.

The court has not overlooked nor failed to

ciate the force of the learned and industrious opinion upon these same questions of Mr. Justice Jenkins in the United States Circuit Court for the Eastern district of Wisconsin against the same defendant (reported 52 Fed. Rep. 43), and affirmed by the Circuit Court of Appeals (7 C. C. A. 603, 59 Fed. Rep. 19). While this court entertains the highest respect for the opinions of those learned courts, and for the distinguished ability of the judges who have pronounced and affirmed that decision, it has yet felt constrained to a different judgment by the force of its former decisions, and by the logic of the situation. It is considered that the view it has taken in this opinion is in accord with the weight of authority and of the better reason.

ATTORNEY AND CLIENT—CONTRACT WITH ATTORNEY—RESCISSION.—That one who makes a contract with an attorney for services, relying on his statement that he is not conducting certain adverse litigation, may rescind the contract on discovering the falsity of the statement, is decided by the Court of Civil Appeals of Texas in Merchants' National Bank v. Eustis. Upon that question the court says:

In Weeks on Attorneys at Law (2d Ed.), § 260, it is said: "An attorney should disclose to his client every adverse retainer, and even every prior retainer which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts which work directly on his interests, or bear on the freedom of his choice of counsel." In Arrington v. Sneed, 18 Tex. 140, the following language is used: "The retainer of employment was for the professional services of the plaintiff in a case which was not to be tried until the succeeding term of the court. This suit was brought before that period arrived. It is plain that the action could not be maintained for services thereafter to be rendered. The plaintiff, therefore, sued first for the mere retainer, and proceeded by attachment. He afterwards amended, averring that the defendant had discharged him from his employment, and claiming compensation for the services actually rendered; but the alleged discharge was after the bringing of this suit, and we are of the opinion that the bringing of the suit, under the circumstances, and in the manner in which it was brought, was sufficient, without adverting to other matter, to authorize the discharge and release of plaintiff from the obligation imposed by the retainer, and dissolved the relation of attorney and client between the parties. That is a confidential relation, and implies a mutual trust, confidence, and good will, which it is not to be supposed could subsist between these parties after the bringing of this suit, under the circumstances." Taking the allegations contained in appellant's answer in this case to be true, it appears that, in the suit involving the 16,000 acres of land, it claimed title under the foreclosure of one mortgage, while its adversary, the Henrietta National Bank, was asserting priority over it under another mortgage, of subsequent date, and appellee was the attorney representing such adverse interest. It may be true that, technically considered, there was nothing in this litigation to prevent appellee from fighting against appellant to the best of his ability in that case, and fighting for it with his utmost strength in the suits contemplated by the contract sued upon all being pending at the same time and in the same court; but, when practically considered, it must be conceded that the average client would not have entire confidence in his doing so. We believe it can almost be stated to be a general rule, with persons anticipating litigation, to refuse to employ attorneys opposed to them in other suits of importance, although they may have no connection with each other; and from the answer in this case it was manifestly a feeling of this kind which prompted the president of appellant bank to make the inquiry he did of appellee, and, realizing this, appellee should have given a full and truthful disclosure of his connection with the matters inquired about, leaving it to appellant to employ him or not, as it might deem proper under the circumstances; and we think his failure to do so sufficient to authorize appellant to cancel the contract induced thereby, upon discovering the real facts.

MARRIED WOMAN—LIABILITY ON NOTE—EXECUTION AS SURETY—ESTOPPEL.—In Bowles v. Trapp, 38 N. E. Rep. 406, the Supreme Court of Indiana decides that a married woman may defend an action on a note of which she is the sole maker on the ground that she executed it as a surety; that she can make no contract charging her separate property for a debt the consideration for which moves solely to another and that she can make through an agent only such contracts as she can make herself. Dailey, J., says:

The decisions of this court affirm the doctrine that a married woman is not bound by the mere form of the contract into which she enters, but the facts must control in determining the question whether the wife or her property is surety for another. Vogel v. Leichner, 102 Ind. 55, 1 N. E. Rep. 554; Nixon v. Whitely, Fasler and Kelley Co., 120 Ind. 360, 22 N. E. Rep. 411; State v. Kennet, 114 Ind. 160, 16 N. E. Rep. 173; Voreis v. Nussbaum, 131 Ind. 267, 31 N. E. Rep. 70. The contention of appellant's counsel that it is hard to see how the question of suretyship can be raised where there is but one maker of the promissory note sued upon is quite plausible. But this is no longer an open question. In Miller v. Snields, 124 Ind. 166-171, 24 N. E. Rep. 670, the court made the same query, and Berkshire, J., said: "It is quite difficult to imagine the relation of principal and surety without a principal, and equally so to find a substantial reason on which to rest the presumption that, whenever a married woman executes her individual promissory note, she occupies the position of surety for her husband or some other person. It is true it may be shown that the individual note of a married woman was given solely for the benefit of the husband, but, when this is claimed by her, it should be made to appear affirmatively." It thus appears that the form of the contract is immaterial to the defense of the wife in this kind of a case, save as it may affect the burden of proof, and require the wife to show that, in the execution of the note in suit, she occupied the position of surety for her husband, or some other person. It will be observed that the demurrer to the answer of the wife admits that the appellant knew the money was loaned to be applied, and was appropriated by him, to the sole use and benefit of the husband, and knew that the words "for my sole use and benefit only," as well as the form of the supposed con-

tract, did not express the transaction, and parted with his money to the husband, and not the wife, and applied $399 of it in payment of the former's debt. Such facts, if established by evidence constitute a complete defense to the action, under previous decisions of this court. Appellant's learned counsel, in his brief, says that the evidence clearly shows that Charles P. Trapp had been acting as his wife's agent in the transaction of business, and invokes the legal maxim "*qui facit per alium facit per se*,"—"he who acts through another acts himself;" *i. e.*, the acts of the agents are the acts of the principal. Black, Law Dict. 982. It is also a familiar rule of law that the capacity of a married woman to contract through an agent is now coextensive with her capacity to contract directly. 14 Am. & Eng. Enc. Law, 620; Wilder v. Abernethy, 54 Ala. 644-646. In Hall v. Callahan, 66 Mo. 316, 324, it was said: "She cannot make a contract through an agent which she could not make herself as a contract with reference to her property not separate." And in this State, so far as she is enabled to contract, she may do so in person or by an agent. Vail v. Meyer, 71 Ind. 159-165. But, as shown, she can make no contract charging her separate estate for a debt the consideration for which moves solely to another. Consequently she cannot do so through an agent. In Fechheimer v. Pierce, 70 Mich. 440. 38 N. W. Rep. 325, the rule was stated that courts will not indulge the presumption of a husband's authority to act for the wife, and a person seeking to hold her for acts done by another must show affirmatively full authority to bind her. It was again said, in Bank v. Gilchrist, 83 Mich. 253, 47 N. W. Rep. 104: "The authority of a husband to act for his wife in the matter of making a loan will not be presumed from the circumstance that he acted for her in other matters, but must be proved, like any other fact, by competent legal evidence." In Voreis v. Nussbaum, 131 Ind. 268, 269, 31 N. E. Rep. 70, this court said: "The fact that the husband did, and the wife did not, receive the consideration for which the note was executed, conclusively establishes the proposition that she was a surety, and not the principal, in the note, notwithstanding the form of the contract."

PRIORITY OF ATTACHMENT LIEN OVER AN UNRECORDED CONVEYANCE.

It has been somewhat broadly stated by a text-writer, that if an attachment debtor had, prior to the levying of the attachment, in good faith transferred the land attached to a third party, the grantor would have no interest in the lands liable to attachment.[1] And by another writer, that if prior to an attachment the debtor had sold and conveyed the land in good faith, and the vendee did not put the deed on record until after the levy, but did so before a sale of the land under the attachment, the land would not be bound.[2]

[1] Kneeland on Attachments, § 382.

[2] Drake on Attachments (5th Ed.), § 234, citing, among other cases, Cox v. Milner, 23 Ill. 476; Savery v. Browning, 18 Iowa, 246; Reed v. Ownby, 44 Mo. 204.

The cases cited to sustain these propositions are founded, in nearly every instance, upon statutes that extend the benefit of the registry acts only to subsequent purchasers for valuable consideration and not to creditors of the vendor. And they illustrate a tendency on the part of text-writers to state, as general rules of law prevalent throughout the United States, rules that are in fact applicable only in particular jurisdictions by virtue of local enactments.

The principal mode of conveying lands at common law prior to the time of King Henry VIII. was by deed of feoffment accompanied by livery of seisin, that is, symbolical delivery of possession to the feoffee. The notoriety which this ceremony gave to the transfer, the infrequency of such transactions and the actual possession of the premises by the feoffee, were deemed by our ancestors in those primitive ages sufficient to warn an intending purchaser that the land had already been sold and conveyed. Afterwards, upon the introduction of the doctrine of uses and trusts, it became possible, by means of deeds of bargain and sale, lease and release, and other instruments operating by way of transmutation of an estate only, to convey lands without passing the possession to the bargainee or releasee, so that one person might be in the possession and apparent ownership of the land, when the real ownership was in another. The inconvenience resulting from this state of the law gave rise to the statute (27 Hen. VIII., ch. 16), which provides that no bargain and sale of lands shall be valid or take effect unless the same be made by writing, indented, sealed and enrolled in the King's courts within six months from the date thereof, etc. Afterwards, by the 2 and 3 Anne, ch. 4 (1703), applicable only in the West Riding of the County of York, it was provided that all deeds and wills not registered according to the provisions of the act, "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration. The benefit of this act was shortly afterwards extended to the county of Middlesex (city of London).[3] Similar statutes were enacted in the colonies of Pennsylvania and Maryland in 1715, and

[3] Shep. Touchstone (8th Eng. Ed.), m. p. 223; 4 Kent. Com. (13th Ed.) m. p. 459; Le Neve v. Le Neve, 3 Atk. 651.

in other colonies about that period. Few, if any, of the early registry acts, either in the old country or in this, embraced creditors within their purview. But in America, the vast increase in commerce during the last century, and the rapidity and frequency of changes in the ownership of real property, brought about an enlargement of the scope of these laws, so that in many of the States creditors, as well as purchasers, are protected against secret and unregistered conveyances.

For the purposes of this article, the registry acts of the different States may be classified as follows:

1. Those which, in terms, extend only to the protection of subsequent purchasers for value and without notice of the prior unrecorded conveyance.

2. Those which declare an unregistered conveyance void as to all persons, except such as have notice of its existence.

3. Those in which protection is in express terms extended to creditors and subsequent purchasers for value, and without notice of the prior unregistered conveyance.

Of the first class of these statutes little is to be said. The cases in which they have been applied necessarily deny the benefit of their protection to subsequent creditors, whether by judgment, attachment or otherwise.[4] These cases, however, as has been seen, have been torn from their proper connection, and cited as authority for the proposition that an execution or attachment cannot be levied on property in which the debtor has no beneficial interest, as where he has sold and conveyed it to a stranger. This is true enough in a general sense, but merely begs the question, when the point is made that, by the express terms of a statute, the title to real property, so far as creditors are concerned, is absolutely and conclusively presumed to be in him in whom the public records show it to be.[5]

The statutes of the second class, or those which invalidate an unregistered conveyance as to all the world except such persons as have actual notice of its existence, operate as freely for the protection of creditors who acquire a lien before the conveyance is registered, as for the protection of purchasers. The benefit of these statutes has been denied to such creditors only as have actual or constructive notice of the unregistered deed. Most of the cases arising under them and involving the rights of creditors turn upon a question of fact, namely: whether the evidence is sufficient to show notice to the creditor; and in most of them in which the point has been raised, actual possession by the purchaser has been deemed notice of the unregistered deed under which he holds.[6] Under these statutes, a creditor who acquires a lien on property with notice that it is held under an unregistered deed will be subordinated to the rights of the grantee;[7] but there can be no question, that if he has no notice of that deed he will have priority over the grantee, and that there is, in such a case, no room to apply the rule that an attachment or execu-

[4] See the cases cited *supra;* also, Valentine v. Havener, 20 Mo. 133; Davis v. Ownsby, 14 Mo. 170; Norton v. Williams, 9 Iowa, 228; Seevers v. Delashmutt, 11 Iowa, 174; Bell v. Evans, 10 Iowa, 353; Thomas v. Kennedy, 24 Iowa, 397; Swarts v. Stees, 2 Kans. 236; Harrison v. Andrews, 18 Kans. 542; Holden v. Garrett, 23 Kans. 98.

[5] Ring v. Gray, 6 B. Mon. (Ky.) 374, where it was said that the obvious intention of the legislature in requiring deeds to be recorded was, as respects creditors, that the title should remain with the grantor, as though no conveyance had been made.

[6] Powell v. Allred, 11 Ala. 318: Byers v. Engles, 16 Ark. 543; Massey v. Westcott, 40 Ill. 160; Walker v. Gilbert, 1 Freem. Ch. (Miss.) 85, 15 Miss. 456; Jenkins v. Bodley, 1 Sm. & M. (Miss.) ch. 338; Money v. Dorsey, 15 Miss. 15; James v. Morey, 2 Cow. (N. Y.) 246; Jackson v. Post, 9 Cow. (N. Y.) 120; Moyer v. Hinman, 13 N. Y. 180; Blankenship v. Douglas, 26 Tex. 225; Rublee v. Mead, 2 Vt. 546; Matthews v. Demerett, 22 Me. 312, where it was said that an attaching creditor might not have the same motives nor the same opportunity to make inquiries respecting an apparent defect of title as a second purchaser, but that he must be regarded as such, and that the law will not give him any superior rights. In Mesick v. Sunderland, 6 Cal. 298, it was held that it was the intent of the registry acts to abolish the doctrine of notice arising from the grantee's possession of the premises. The controversy in this case, however, was between the grantee and a subsequent purchaser. Norcross v. Widgery, 2 Mass. 506; Priest v. Rice, 1 Pick. (Mass.) 168. Later cases in Massachusetts hold that facts sufficient to put an attaching creditor on inquiry are not sufficient to charge him with notice of the unrecorded deed, Richardson v. Smith, 11 Allen (Mass.), 134, and that consequently possession by the grantee under such deed is not sufficient to charge the creditor with notice of its existence, and is to be taken only as a circumstance tending to show notice to the creditor. Parker v. Osgood, 3 Allen (Mass.), 487; Sibley v. Leffingwell, 8 Allen (Mass.), 584.

[7] 2 Pomeroy, Eq. Jur. § 723; Farnsworth v. Childs, 4 Mass. 637; Davis v. Blount, 6 Mass. 487; Prescott v. Head, 10 Mass. 60; Brown v. Maine Bank, 11 Mass. 158; Priest v. Rice, 4 Pick. (Mass.) 167; Britton's Appeal, 45 Pa. St. 172; Mellon's Appeal, 32 Pa. St. 121; Daniel v. Sorrells, 9 Ala. 436; Burt v. Cassidy, 12 Ala. 734; Boehringer v. Creighton, 10 Oreg. 42; Canda v. Powers, 38 N. J. Eq. 412.

tion can bind only such interest as the debtor may have in the property sought to be subjected.[8]

The third class of statutes, or those in which protection is in express terms extended to creditors and subsequent purchasers for value, and without notice of the prior unregistered conveyance, is that to which attention is specially directed.[9] The classes of cases which arise under these laws are, first, those which deny the benefit of the statute to a creditor with notice of the prior unregistered deed; and, second, those which protect the creditor, though he had actual notice of the existence of such conveyance at the time he commenced proceedings to acquire his lien. It is unnecessary to consider here the rights of a mortgagee or other person who takes a conveyance as security for a debt because all such are themselves merely creditors of the grantor, and have no equities superior to those of judgment or attachment creditors. The latter have a right to acquire priority if they can, and having equal equities the law must prevail between them and the mortgagee.[10] But with respect to purchasers for value who hold under unregistered conveyances, there is a conflict of decision as to the construction of statutes subordinating their claims to those of "creditors and subsequent purchasers for value and without notice" of the prior deed. There are cases which put creditors and purchasers on the same footing under these statutes, and hold that a creditor with actual or constructive notice of the prior deed acquires no preference over the grantee, and that possession of the premises by the grantee is constructive notice of his rights.[11] In other States, creditors are treated with more consideration than purchasers, and are accorded priority over the unregistered conveyance, regardless, not only of possession by the grantee, but of actual notice of his rights.[12] "Creditors," under these statutes, are of course only those who acquire a specific lien on the premises in dispute, either by judgment, attachment or otherwise.[13] In some cases, "creditors without notice" has been held to mean those without notice at the time of commencing proceedings to acquire a lien on the debtor's land, and that only such are entitled to protection, on the ground that it is a species of fraud in the creditor to attempt to acquire a lien after he has been informed of the prior conveyance.[14] But other cases hold that if the creditor receive notice of the unregistered deed after the credit was given and the debt contracted, he has a right to try his speed with the grantee, and that if he can fasten a lien on the property by attachment or otherwise, before the grantee can record his deed, he has a right so to do.[15] This seems the better view. The object of the statute, in compelling a purchaser to put his deed on record, is to advise creditors of the true ownership of the property; and it would seem illogical and unreasonable to deprive them of the benefit of its provisions on account of notice of a delinquent grantee's rights, received at a time when they no longer have an opportunity to avoid danger by refusing the credit. * The decisions which protect creditors against unrecorded conveyances, whether they have notice or not, have been rested in some instances, upon the particular phraseology of the statute under con-

[8] Marshall v. Fisk, 6 Mass. 24; Cushing v. Hurd, 4 Pick. (Mass.) 252; McMechan v. Griffing, 9 Pick. (Mass.) 537; Sigourney v. Larned, 10 Pick. (Mass.) 72; Coffin v. Ray, 1 Met. (Mass.) 212; Woodward v. Sartwell, 129 Mass. 212; Roberts v. Bourne, 23 Me. 165; Veazie v. Parker, 33 Me. 170; Lamberton v. Bank, 24 Minn. 282, distinguishing Greenleaf v. Edes, 2 Minn. 226 (264).

[9] Such statutes exist in Ill., Minn., Neb., Del., Dist. Col., Va., W. Va., N. C., Ky., Tenn., Ark., Tex., Miss., Fla., La.; Stimson's Am. Statutes (1st Ed.), § 1611.

[10] Davidson v. Cowan, 1 Dev. (N. C.) Eq. 470; Jackson v. Luce, 14 Ohio. 514.

[11] Walker v. Gilbert, 1 Freem. Ch. (Miss.) 85; *Id.* 7 Sm. & M. (Miss.) 456; U. S. v. Howgate, 2 Mackey (D. C.), 408.

[12] Guerrant v. Anderson, 4 Rand. (Va.) 208; McCullough v. Summerville, 8 Leigh (Va.), 433; McClure v. Thistle, 2 Grat. (Va.) 182; Gay v. Mosely, 2 Munf. (Va) 543; Campbell v. Mosely, Litt. Sel. Cas. (Ky.) 358; Edwards v. Brinker, 9 Dana (Ky.), 69; Ring v. Gray, 6 B. Mon (Ky.) 368; Washington v. Trousdale, Mart. & Yerg. (Tenn.) 385 (673); Douglas v. Morford, 8 Yerg. (Tenn.) 373; Hayes v. McGuire, 8 Yerg. (Tenn.) 91; Lillard v. Ruckers, 9 Yerg. (Tenn.) 64; Butler v. Maney, 10 Humph. (Tenn.) 420; Davey v. Littlejohn, 2 Ired. Eq. (N. C.) 495; Mayham v. Coombs, 14 Ohio, 428. In Helm v. Logan, 4 Bibb (Ky.), 78, the creditor was protected though he had notice of the unregistered deed at the time he gave the credit.

[13] McCandlish v. Keen, 13 Grat. (Va.) 615, 637; Hervey v. Champion, 11 Humph. (Tenn.) 570, where it was said that the lien of an attachment was no less operative to defeat an unregistered deed than the lien of a judgment or execution. See, also, Sharp v. Hunter, 7 Cold. (Tenn.) 395.

[14] Martin v. Dryden, 1 Gilm. (Ill.) 187, and cases there cited.

[15] Graham v. Samuel, 1 Dana (Ky.), 166.

sideration. Thus, in a provision that an unrecorded deed "shall be void as to creditors, and subsequent purchasers without notice," it was held that the words "without notice" had no application to the preceding word "creditors," and were descriptive only of the words "subsequent purchasers."[16] It has also been considered that the creditor commits no fraud in giving credit upon the general responsibility of the grantor, and that having equal equity with the grantee, the law shall prevail; and that a purchaser who neglects to put his deed on record, whereby others are or may be misled, deserves no favors.[17]

It would be idle and unprofitable to enter here upon any discussion of the respective merits of the laws which deny and those which extend protection to creditors, as against the claims of one holding under an unrecorded conveyance. The purposes of the writer will have been accomplished if he has succeeded in demonstrating the fallacy of the proposition, that one who has conveyed away his lands and received the purchase money in full, has no interest therein liable to levy or attachment, when sought to be applied in a case where the grantee has never recorded his conveyance, where the creditor has no notice of the existence of that conveyance, and where the case is governed by a statute which provides in terms that an unrecorded conveyance shall be void as against creditors of the grantor. An attentive examination of the cases cited must convince the reader that no such proposition can be maintained without utterly subverting the principles and theories on which the registry acts are founded.[18]

CHAPMAN W. MAUPIN.

Washington, D. C.

[16] Guerrant v. Anderson, 4 Rand. (Va.) 208.

[17] *Id.*

[18] The writer has encountered but one case in which any such proposition under like circumstances has been asserted: United States v. Howgate, 2 Mackey (D. C.), 408, Cox, J., dissenting. There the attaching creditor, the United States, levied on a lot which the debtor had sold and conveyed, but the conveyance was not recorded until after the levy. The laws of the District of Columbia provide that "All deeds · · · entitled to be recorded, shall take effect and be valid as to creditors, and as to subsequent purchasers for valuable consideration without notice, from the time when such deed shall · · · be delivered to the recorder of deeds, and from this time only." 20 Stat. U. S. 40, 41. The purchaser took possession and was residing on the premises at the time of the levy. A majority of the court concurred in the opinion that the attachment should be quashed, Mr. Chief Justice Cartter, taking the ground that a creditor with notice of the rights of the grantee was not protected by the statute, and that actual possession by the latter was sufficient to charge the creditor with notice. In both these respects the case, as we have seen, is not without precedent. But the opinion of Mr. Justice Hagner goes much farther and lays down propositions that are apparently at war with the registry act, namely, that the law does not permit an attachment to be levied on property which does not belong to the debtor; and that if the debtor has sold the property, and received the purchase money, his creditors cannot attach it though the legal title may still be in him. These propositions the learned judge rests upon the authority of Houston v. Nowland, 7 Gill & J. (Md.) 480, but upon examination of that case it will be found that it involved the construction of no statute declaring unregistered conveyances void as to creditors without notice. The dissenting opinion of Mr. Justice Cox in U. S. v. Howgate, *supra*, clearly demonstrates the inconsistency of those propositions with the registry act governing that case.

WILL—REVOCATION BY MARRIAGE.

BROWN V. SCHERRER.

Court of Appeals of Colorado, Nov. 12, 1894.

The marriage alone of a man, without the birth of a child, revokes his prior will, as, by statute, the wife is made the heir of her husband.

BISSELL, P. J.: This appeal presents a question entirely new to our jurisprudence. We have therefore approached its consideration with great circumspection, and with careful study of all the decisions which industrious and able counsel have collected. The question is, does marriage, without the birth of an heir, operate to revoke a will?

In October, 1881, Richard Brown was the husband of Celestial. On that date he made his will, whereby he bequeathed to her all his personal property, and a life estate in all else of which he should die seised, and limited on that estate a fee in remainder to Henry and William Scherrer, and appointed their father his executor. There was no issue of this marriage. The wife died in February, 1884. Subsequently, Richard intermarried with Catherine M. and lived with her, as man and wife, till February, 1893, when he died, leaving Catherine as his only heir at law. In April, Alexander Scherrer offered the will of 1881 for probate. Its probating was resisted by the heir and widow, Catherine, on two hypotheses: First. On the ground that the two sons of Alexander, who were the legatees of the fee of the real estate, were not of kin, and disentitled to take, because of an attempted revocation of the will by Richard Brown, the devisor. She set up that the elder Scherrer was the custodian of the will, averred an attempt by Brown to procure possession of the testament for the purposes of cancellation, and acts of Scherrer, which, if provable and sustained, would tend to show that

he had fraudulently prevented a statutory cancellation. Second. On the theory that when Celestial deceased, and the devisor intermarried with Catherine, the will was revoked by operation of law. The objections were demurred to, and the will was admitted to probate. The widow appealed.

The first objection will be disposed of with but a single suggestion. The statute of Colorado which relates to the cancellation of wills is almost identical with the English statute of frauds on this subject. 29 Car. II. ch. 3, § 6; Gen. St. Colo. 1883, § 3484. Since the passage of the statute, the English judges have almost universally held that a statutory cancellation must be established, if the probate is to be successfully resisted. There has been some disposition to admit proof of acts of the testator which would serve to establish a revocation, though declarations made by him at the time have been held clearly incompetent to prove that the will was revoked. To this extent the modern authorities also go. Christopher v. Christopher, 2 Dick. 445; Marston v. Roe, 8 Adol. & E. 14 (35 E. C. L. 457); Wheeler v. Wheeler, 1 R. I. 364; Hoitt v. Hoitt, 63 N. H. 475, 3 Atl. Rep. 604. This rule is, of course, subject to the qualification suggested in some of the cases, that, when acts showing a purpose to destroy are once offered, the declarations may be introduced in order to illustrate and signify the intent. Counsel insist that the rule ought to be further modified when there is proof of fraudulent conduct by the custodian, legatee, or proponent, of which the legatees seek to take advantage. Whether a case may arise in which the courts shall deem it wise to ingraft such an exception on the general doctrine is here only a matter of unprofitable speculation, since we practically eliminate this subject from our inquiry, and put the decision on the broad basis of a revocation by operation of law.

At the threshold we desire to insist that as we understand the cases, and the reasons underlying the rule that marriage and the birth of an heir operated to revoke a will, we do not depart from the ancient landmarks. The doctrine was borrowed from the ecclesiastical law, and it was many years after its first suggestion before the common-law lawyers would accept it. It was long regarded by able common-law judges as a practical repeal of the statute of frauds, which has always been held in high esteem by these tribunals. It was, however, finally settled by two or three well-considered cases. No English courts have since questioned the law. Spraage v. Stone, 2 Amb. 721; *Doe dem.* Lancashire v. Lancashire, 5 Term., R. 49; Kenebel v. Scrafton, 2 East, 530. According to these decisions marriage and the birth of an heir did revoke a will. Lord Kenyon, in the Lancashire Case, held it was a tacit condition annexed to all wills that these two concurring circumstances should annul the antecedent devise. He put it on the impregnable ground that these two circumstances worked such a material change in the testator's condition that it was not to be expected his devise was made in contemplation of such changed obligations. The husband and father's duty to his family was deemed to furnish an irrefragable argument against the contention that the will should stand as the expression of the testator's intent, notwithstanding the assumption of these new relations. The learned judge said it was not to be supposed that the wife and heir, who were peculiarly the objects of tender solicitude on the part of the husband and father, should be left unprotected by his bounty,—a reason which is as strong and operative to-day as it was when the rule was first ingrafted on the body of the common law. It is wise, however, to consider the limitations which the common-law courts put upon the rule as they accept it, and to express the reasons which they assign for the exceptions, since these reasons very largely influence this court in arriving at its determination. Those courts undoubtedly adjudged that marriage alone was not operative to revoke a will. This law has been repeatedly reannounced in this country by numberless courts, but no case, so far as we are able to discover, presented the precise considerations offered in the present suit to influence the court. It may be well to suggest that, as we read the modern cases, wherever this rule has been reannounced it has generally been in actions where either there was both marriage and the birth of an heir, or in cases where there was no such controlling statute as we hold ours to be. Many of the modern cases undoubtedly say, by way of quotation and repetition of these common-law authorities, that marriage alone does not operate to revoke a will; but these adjudications do not attempt to analyze the law when they apply it, or, if they do, they are without similar statutes, or the statutory rule does not to them seem as controlling as it does to us. The English common law authorities held that neither marriage, nor marriage followed by the birth of a female child, would operate to revoke a will whereby lands were devised, although together they might operate to destroy it, so far as it concerned the personalty. The reason they give (and it is very sound, viewed from the standpoint of those judges) is that neither of these two classes of people (wives or girls) could inherit lands. Under the English statute of primogeniture, the lands went to the male heirs in absolute succession, and ordinarily without power on the part of the devisor to change the right of succession. It is thus apparent that, in the acceptance of this rule of the ecclesiastical law, the English common-law judges went to the limit essential to the absolute adoption of the principle. In other words, they certainly decided that, wherever an heir who could inherit land sprung into being, it should be held to revoke the will, since it was not to be presumed that the will was executed in the contemplation of such a changed condition. This broad basis seems not to have been always consid-

ered by the American courts when they have attempted to restate and reapply existing law to new and novel conditions. In the conclusion at which we arrive, we are not, however, without the support of cases in this country. Garrett v. Dabney, 27 Miss. 335; Tyler v. Tyler, 19 Ill. 151; Morgan v. Ireland, 1 Idaho, 786. *Vide* Tied. Real Prop. § 888; Swan v. Hammond, 138 Mass. 45.

The authority of these adjudications is very much supplemented by our statutes of descent. Chapter 28, Gen. St. Colo., broadly provides that when a person dies intestate, without children, but leaving either husband or wife, the wife or husband, as the case may be, shall inherit the entire property, subject to the payment of debts. Chapter 72 confers upon married women the right to make wills bequeathing their real as well as their personal property, but it contains a broad limitation upon the rights of either the husband or the wife concerning the testamentary disposition of property. No matter what will either one make, neither has capacity to devise more than one-half of the property of which they may die siesed. These statutes have been construed in this State by the Supreme Court, as well as by our own, and under those decisions it is undoubtedly true that a will of more than one-half the property is inoperative to deprive either husband or wife of their rights of inheritance. Mitchell v. Hughes, 3 Colo. App. 43, 32 Pac. Rep. 185. Thus it is evident that by the statutes of Colorado the wife is, by law, an absolute heir to the husband's estate, so that she is put by that legislation into precisely the same position the male heir occupied under the English law of primogeniture with reference to the inheritance of lands, with this exception: While the English heir took all the lands, and the testator was powerless to deprive him of the right of succession, in Colorado the wife holds this position only with reference to half the estate. That this position is, by the statute, limited to an aliquot part of the lands of which the devisor may die siezed, should make no difference in the application of the rule, or in its scope and extent. The English law rests on the firm foundation that the birth of an heir who can inherit lands shall be held operative to destroy a will, because it is not to be conceived that the testator has devised his estate in view of such an extraordinary alteration in his condition. The same principle and the same rule can be urged with like force in our own legislation. As stated by the English cases, and in those which have followed the law which they announce, it is a strained conception to assume that a man who has made a will while unmarried has made it in contemplation of his assumption of the marriage relation. There is no force in the suggestion that, because the woman becomes an heir by virtue of the statute, she does not come within the beneficient provisions of the rule as declared at the common law. It was by the law only that the male heir succeeded to the testator's lands, and took his inheritance. That the wife has become an heir by legislation forms no lesser reason for the application of the rule. The Mississippi case, in construing their act of 1839, with reference to its force and effect upon the will of a woman, executed when she was a *feme sole*, who thereafter intermarried, is entirely in accord and in harmony with the reasoning of this court. The court decided that since, by operation of the statute, the husband became entitled to an absolute interest in fee in the estate of the woman, it must be held operative to destroy the will of the *feme sole*, because it was inconsistent with her absolute right of testamentary disposition. The same legal limitations, to a certain extent, exist in this State, because by virtue of the assumption of the marriage relation, and the death of either one party or the other, the survivor has an absolute vested interest in fee in the estate of the decedent. The decision is, of course, only useful as furnishing a reason for the doctrine declared. It is inapplicable as a construction of our testamentary statutes, for we have modifying provisions which would in some particulars, possibly lead to different conclusions.

We believe we have decided this case upon principle, and trust we have been entirely uninfluenced by the equitable considerations which the facts of the case present. It is quite true the testator devised his real property to two strangers, to whom he was under no obligations, prior to the time he contracted his marriage with the present appellant. It is equally true he attempted to destroy the antecedent will, and was prevented by the fraud of the father of the two children who would take by the terms of the devise. The only force which we have given to these facts is by way of illustration, to give significance to the reasons which the common-law courts originally expressed in the adoption of the rule itself. It is hardly to be supposed that, when the testator executed a will whereby the fee of his estate was given to these two strangers, he could have made his devise in contemplation of his marriage with the appellant, who should thereby, at least as to the aliquot part thereof, be left out of his consideration as an object of his bounty. It operates to the injury of no one who is entitled to aid at the hands of the testator to hold there was annexed to the will the tacit condition that in case of a subsequent marriage the will should be deemed to be revoked. In accordance with what we believe to the spirit and reason of the doctrine, and in accord with what we believe to be the purpose and spirit of our legislation, we hold the marriage of a testator, whether or not it be followed by the birth of an heir, is operative to revoke any will which he has antecedently made. Since the judgment of the court below does not accord with the law as it is herein declared, the cause will be reversed and remanded. Reversed.

NOTE. — *Implied Revocation of Will.* — An implied revocation of a will is a deduction of law from established facts. 6 Lawson's Rights, Remedies & Pr. 5252; Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Amer.

Dec. 41. It also exists under the statutes, in many cases, as by subsequent marriage and the birth of a legitimate child. If a testator's circumstances are so altered that such new moral testamentary duties have accrued to him subsequent to the date of the will, as may be presumed to produce a change of intention, this will amount to an implied revocation, except as to persons who could gain nothing by a revocation or whose remedy is perfect without it. Young's Appeal, 39 Pa. St. 115, 80 Amer. Dec. 513. See also note to Graves v. Sheldon, 15 Amer. Dec. 659. Whether the marriage of a testator or testatrix entered into after making a will operates as a revocation depends largely upon the statutes of the several States. And the seeming conflict of authority upon this point may in many cases be accounted for on this basis. It has been held that the testator's marriage is not a ground of revocation (Hoitt v. Hoitt, 63 N. H. 475), and that a woman's antenuptial will is not revoked by her marriage. Fellows v. Allen, 60 N. H. 439, 49 Amer. Rep. 328. So where a married woman has power to make wills, as if single, the will of a single woman is not revoked by her subsequent marriage (Noyes v. Southworth, 55 Mich. 173), nor is the will of a married woman revoked by her subsequent marriage where the statutes secures to her the absolute right to dispose of her property during coverture. Will of Ward, 70 Wis. 251. And see *In re* Fuller, 79 Ill. 99. The testamentary incapacity of a married woman having been removed by statute in Maine, it has been held in that State that the will of a *feme sole* is not revoked by marriage. *In re* Hunt's Will, 17 Atl. Rep. 68, 81 Me. 275. In Maryland it has also been recently held that since the statute, which provide that a married woman shall hold for her separate use all property acquired or owned both before and after marriage with power of devising the same as fully as if she were a *feme sole*, removes the testamentary capacity of married women, the will of a *feme sole* is not revoked by marriage. Roane v. Hollingshead (Md.), 25 Atl. Rep. 307. But under statutes prescribing the modes of revoking a will a recognizing revocation "implied by law from subsequent change in the condition or circumstances of the testator" a woman's will is revoked by her subsequent marriage. Swan v. Hammond, 138 Mass. 45; Brown v. Clark, 77 N. Y. 369; Tyler v. Tyler, 19 Ill. 151. See, also, notes to Fallon v. Chidester, 26 Amer. Rep. 159; Young's Appeal, 80 Amer. Dec. 516; Fellows v. Allen, 49 Amer. Rep. 329.

Under the statutes of several States the subsequent birth of a legitimate child where there is no provision in the will covering such contingency, operates as a revocation of the will. See Young's Appeal, 39 Pa. St. 115; Negus v. Negus, 46 Iowa, 487; Rhodes v. Welty (Ohio), 20 N. E. Rep. 461; Condert v. Condert, 43 N. J. Eq. 407; Belton v. Sumner (Fla.), 12 South. Rep. 371; Wilson v. Ott, 160 Pa. St. 159. It has been held in Indiana that a will is not revoked by the legal adoption of a child. Davis v. Fogle (Ind.), 23 N. E. Rep. 860.

CORRESPONDENCE.

THE DECISION OF JUDGE PARKER.

To the Editor of the Central Law Journal:

Noticing a communication, appearing in your JOURNAL of December 21, 1894, commenting on, and criticising a decision of Judge Parker, of the United States District Court, for the Western District of Arkansas, a general summary of which appeared in your LAW JOURNAL (39 Cent. L. J. 275), and as the tenor thereof reflects, not upon the opinion, but, apparently, upon the judge delivering the same, because it is therein claimed and charged that proper respect has not been shown to the supreme judicial tribunal of the land, the Supreme Court of the United States, and that prompt obedience to the laws has not been rendered and observed by the judge aforesaid, to the orders of the supreme appellate tribunal of the land, whose duty, above all others, it was so to do; therefore, in justice to Judge Parker, such communication merits to be noticed, and not to be passed by in silence and inattention. The criticisms were based upon erroneous premises and a misapprehension of the legal questions involved, and, evidently, without any examination of the questions of law involved as applicable to the facts, as they are not supported by the facts in the case. There was no order or mandate of the appellate court and none was disobeyed, as the Supreme Court never made any order in said cause. The provisions of the statutes of this State and the Indian Territory do not in any way bear upon or effect the letting of bail, after conviction and sentence, pending the determination of a writ of error, and they are not of any value on the question; and, furthermore, the decision of Judge Parker was not, and could not be, an overruling or reversing of an order of the Supreme Court, as no order in regard thereto has ever been made by the Supreme Court. Had such order been made by the Supreme Court of the United States it would have been promptly obeyed and complied with by Judge Parker, and it would, in that case, have been the lookout of the Supreme Court if it had no legal authority for making such an order. In his decision Judge Parker did not set aside and disregard any order of the Supreme Court of the United States. The facts have not been grasped or comprehended. They are: That a man by the name of Lafayette Hudson was indicted and convicted in Judge Parker's court, sitting in this city, of an assault with intent to kill, in the Indian country, and sentenced to imprisonment at hard labor in the penitentiary of Kings County, New York, for the term and period of four years. On the 17th day of May, 1894, Hudson filed his motion for new trial, which was overruled; he then tendered his bill of exceptions, duly signed by the judge; he then filed with the clerk an assignment of errors. On August the 6th, 1894, the judge of the court ordered that, upon filing an assignment of errors, the clerk should issue a writ of error, taking the case to the Supreme Court of the United States, in order that any alleged errors might be corrected, when found to exist, by the said Supreme Court; this writ of error, at the request of defendant's counsel, was not immediately issued by the clerk. Before the clerk issued the writ of error, afore-aid, defendant by petition applied to Hon. Justice White, one of the associate justices of the Supreme Court of the United States, at his chambers, for a writ of error, and for bail, pending the hearing on writ of error to the Supreme Court. On this petition, so filed, Mr. Justice White, on August 14, 1894, made the following order: "Writ of error, to operate as *supersedeas*, allowed returnable according to law; the defendant to furnish bail in the sum of $5,000, conditioned according to law, subject to the approval of the district judge." No citation was served until the 21st day of August, 1894, which was after Hon. Justice White had made the above order. This order, so made by the Hon. Justice White, was not an order made by the Supreme court. The real question, therefore, involved is: Did

Hon. Justice White, at Chambers, under the law and rules of the Supreme Court of the United States governing writs of error in criminal cases, have power to grant the writ of error and have same operate as a *supersedeas* and admit the defendant to bail, upon defendant giving bond conditioned according to law, subject to the approval of the district judge? If Hon. Justice White had no authority either by statute or by rule of the Supreme Court promulgated and adopted by authority of law, then such order was a nullity. Before Mr. Justice White could grant bail, either by law or the rules of the Supreme Court, there must be a federal statute authorizing the granting of bail in criminal cases after conviction and sentence and pending in the Supreme Court of the United States; or, if there be a rule of the Supreme Court so admitting to bail, said rule must be adopted by virtue of some law or act of congress authorizing the same. The Supreme Court of the United States is the only Federal Court expressly provided for by the federal constitution, and, in addition to its limited original jurisdiction directly conferred upon it by the terms of said constitution, it only has such appellate juri diction as congress from time to time may prescribe. There was no right of appeal in criminal cases by writ of error or otherwise to the Supreme Court of the United States until the act of congress, passed January 25, 1889 (25th U. S. Stat. at Large, page 655), which provided in section 6 that, upon application of the respondent, in all cases of conviction of crime, the punishment of which by law is death, tried before any court of the United States, the final judgment of such court against respondent shall be examined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. This act did not take effect until after the first day of May, 1889. This allowed and permitted writs of error only in cases of conviction, where the penalty was death, and did not cover cases of assault with intent to kill, and infamous crimes. So that, until the enactment of the aforesaid act of congress of January 25, 1889, there was no appeal by writ of error or otherwise, direct from the District and Circuit Courts of the United States, to the Supreme court, and then the aforesaid act of congress permitted the same in capital cases only. The law remained in this condition until the act of congress of March 3, 1891, establishing Circuit Courts of Appeals (26th U. S. Stat. at Large, page 827), was enacted. By section 5, paragraph 3, thereof, it confers the right and authorizes appeals or writs of error, from District courts or from existing Circuit Courts, direct to the Supreme Court, in cases of conviction of a capital or otherwise infamous crime. There is no provision in this act of congress authorizing and providing for bail after conviction and sentence, and pending the adjudication of a writ of error or appeal in the Supreme Court, and there is no provision therein authorizing and empowering the Supreme Court of the United States, by rule or otherwise, to prescribe and promulgate any rule of its court admitting defendants to bail, after conviction and sentence, pending the determination of a writ of error or appeal in criminal cases. This can be readily perceived by careful reading of said act of congress. The Supreme Court under the act of congress of January 25, 1889, may establish rules as to capital cases, but neither acts of congress authorize rules admitting to bail in any criminal case after conviction and sentence. So, that the authority of Hon. Justice White to admit a defendant to bail after conviction and sentence cannot be claimed under the provisions of the acts of congress aforesaid, as no such power is therein conferred upon any justice or tribunal, and the aforesaid acts of congress are wholly silent in regard thereto, and make no provision whatsoever as to the same. So that there is no federal statute authorizing bail to be taken after conviction and sentence and pending the hearing of the writ of error, and there is no federal statute authorizing the Supreme Court of the United States to establish or frame any rule of court so to do. Notwithstanding that there existed, or now exists, any act of congress or federal statute admitting to bail, so as aforesaid, or authorizing the Supreme Court so to do, the aforesaid Supreme Court of the United States, at its October Term, 1890, promulgated the following as part of rule 36; the same being paragraph 2 of said rule, to-wit: "Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed." The order of the Supreme Court specified that this paragraph of the aforesaid rule, among others, was adopted as the rules of said court. Under the act, approved March 3, 1891, entitled: "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." Assuming, for the present, that the Supreme Court had the legal authority to formulate such rule by the very terms thereof, the descretionary power to admit to bail is vested in the judges named in said rule, and limits the courts and judges who are to admit to bail. The word "thereof" limits the word "justice or judge" to the "justice or judge" of the courts therein specified; that is: The circuit or district court of the circuit where the case was tried. This is manifestly the interpretation placed upon this rule in case of United States v. Simmons, 47 Fed. Rep. 724. The rule, when it speaks of a justice thereof, evidently must mean a justice of the Circuit Court, for the word "thereof" means of that court, or of that Circuit Court, in which the case is tried. There is no such officer as the justice of the District Court. Now, who is the justice of the Circuit Court of this, the eighth circuit? Section 605, Rev. Stat. U. S. says: That the words "circuit justice" and "justice of a circuit" shall be understood to designate the "justice of the Supreme Court," who is allotted to any circuit; but the word "judge," when applied generally to any Circuit shall be understood to include such justice." Section 606 of the aforesaid Rev. Stat. provides for the allotment of the chief justice and the associate justices of the Supreme Court among the circuits. The aforesaid sections provide, also, for the method of such allotment. The last allotment, under authority of the aforesaid actions, were made on the second day of April, 1894, and is contained in volume 152, Sup. Ct. Rep. Associate Justice White was allotted to the fifth circuit, this makes him a justice of the Circuit Court of the fifth circuit, Associate Justice Brewer was allotted to this, the eighth circuit, he is the only justice of the Circuit Court of this circuit; hence, Mr. Justice White is not one of the judicial officers mentioned in the second paragraph of rule 36, and, consequently, he is without authority to make the order to admit to bail in this circuit. It may be contended that the case being in the Supreme Court, and Mr. Justice White being an associate justice of such court could, therefore, admit to bail. When, on the 14th day of August, 1894, the order admitting the defendant to

bail was made in the case, no citation had been served as required by said rule; the acknowledgment of the service of the citation was had and made by the district attorney of the district on the 21st day of August, 1894, seven days after the making of the order by Mr. Justice White; therefore, there was no service of citation at the time of the making of the order, and hence the case could not be in the Supreme Court when the order was made so as to give that court jurisdiction of the cause, but if it was in the Supreme Court such court has fixed, by its said rule, who shall admit to bail, and when, in cases like this, it has not said that an associate justice, as such, of the said Supreme Court shall admit to bail, but it has said that he must be a judicial officer, known to the law as a justice of the Circuit Court, and this character can only be conferred by allotment.

So that even if this rule be a valid one, under the very terms thereof Mr. Justice White, not being the circuit justice of this court, could not make the order admitting defendant to bail; so that under the rule aforesaid the order of Mr. Justice White in this case not being authorized was and is void. If this rule had been construed by the Supreme Court the decision of said court thereon would have been binding and conclusive upon the inferior tribunals of the federal government, but there exists no such construction. It is self-evident on an examination of the law that the Supreme Court has no authority of law to adopt and promulgate the rule aforesaid, and it is not what ought to be, but what is the law. At common law there exists no right to bail after conviction and sentence, and when the right of bail is allowed after conviction it has been expressly given by statute, and, as a general rule, it has never been exercised after conviction without a statute declaring that it might be given. But no such power, either express or implied, is given by any federal statute. Bail has never been allowed after conviction and sentence, pending an appeal or writ of error, except in pursuance of an express statute authorizing and permitting it, or unless a constitutional provision is broad enough under such circumstances to authorize bail. There is no provision of the federal constitution comprehensive enough allowing bail after conviction and sentence, and pending the determination of a writ of error or appeal. The laws of the United States fully provide for bail of parties under arrest before conviction and sentence, but not otherwise. Under § 917, Rev. Stat. U. S., the Supreme Court of the United States has the right to make all needful rules and regulations, touching its procedure, not in conflict with the laws or constitution of the United States. This power to promulgate rules of procedure or practice having been conferred by statute, all such rules so framed have the force and effect of a statute. But the right to give bail in criminal cases, after conviction and sentence, is not a rule of practice or procedure. The right to say when and in what cases bail may be taken must be regulated by the law-making power of the government, and as the judiciary must conform to the law as it stands, the Supreme Court, by any rule made by it cannot supply the omission of the federal statutes in this respect so as to supply the omission, and if relief from a statute, which works an injury, or prevents a proper administration of justice is sought, application should be made to the law-making power to remedy the defect and afford relief. Courts have no right to legislate by rule of court or otherwise to remedy such defect, as they are not the law-making power, and as their rules are subordinate to the law, and in case of conflict the law will prevail. Whilst the rules of the Supreme Court, made by authority of statute, have the binding effect of an act of congress, yet if made without authority of law they are a nullity and may be disregarded. Ward v. Chamberlain, 2d Black, U. S. Rep. page 430. In the above case the Supreme Court disregarded one of its own rules, because it was made without authority of law. There was no decision of the Supreme Court construing this rule so as to make its construction and operation conclusive and binding upon the inferior courts. Bail bonds must be executed in pursuance of an order of a proper court or officers, and they are only valid when taken in pursuance of law, and the order of a competent court or judge to make them valid and binding upon the principal and surety. It necessarily follows that, in any view of the question, the order of Mr. Justice White was unauthorized and therefore void. Was it not, then, the duty of Judge Parker, in the interests of justice, law and order, to refuse to exercise his judicial discretion in approving such bond, so that the attention of the Supreme Court could be called thereto and the matter determined and settled by it as a court? To have pursued any other course would not have been conducive to the proper administration and enforcement of law and its faithful observance, so as to afford to each and every citizen by the courts of the country that protection to which they are of right entitled to under the constitutional guaranty of protecting their rights, of life, liberty and property. To have approved such void bail bond would have amounted to an absolute discharge of defendant for all time from custody, and such action would not have been in the interest of liberty but of licentiousness and lawlessness. Fearing that this might become too voluminous for publication if citing the authorities sustaining each and every proposition stated the same have been omited, but will cheerfully furnish the same if desired. It therefore seems passing strange that such criticisms should have been indulged in by any intelligent person who had candidly, fairly and impartially examined the questions and the law involved and applicable thereto, besides it is submitted that the Supreme Court of the United States needs no champion or defender, as it is amply able under the law to take care of itself. It furthermore seems unmerited that a judge, who is acting conscientiously, and whose sole object is to enforce and observe the laws as he finds them, and to have judicial proceedings conform thereto, so as not to afford an open highway for criminals to defeat justice and escape unscathed and unpunished for crime, should be wantonly and needlessly criticised for upholding the majesty and integrity of the law.

Fort Smith, Ark. JAMES BRIZZOLARA.

JETSAM AND FLOTSAM.

THE COMMON LAW AND THE INDIANS.

The "indolent legislation," as Judge Knowles so aptly characterized the fragmentary way in which congress has attempted to subject Indians to civilized law, is well illustrated in the resulting difference of opinion among the judges as to whether the common law affects them. In Pycatt v. Powell, 61 Fed. Rep. 551, Judge Sanborn held that the common law as applied in the United States courts should control a question of property within the Indian Territory. In Davidson v. Gibson, 56 *Id.* 443, Judge Caldwell held that the common law did not prevail, but the statutes

of Arkansas. We do not say that the cases are not distinguishable, and perhaps reconcilable; but since it has been settled that there is a common law of the United States (1 *University Law Review*, 4), every step by which the courts can consistently extend the application of that law to determine controversies between Indians, and between Indians and whites, is to be hailed as a step in advance. For recent cases illustrating the mischief of a contrary rule, and the doubt which many of the profession are in on the question: What law is there for Indians, see State v. Campbell, 55 N. W. Rep. 553; Gulf C. E. S. F. Co. v. Johnson, 4 U. S. C. C. of App., 447; Davison v. Gibson, 56 Fed. Rep. 443; United States v. Barnaby, 51 Fed. Rep. 20; Mehlin v. Ice, 56 Fed. Rep. 12.—*The University Law Review.*

EFFECT OF PAROL PROMISE TO PAY MORTGAGE TAX.

Does a parol promise by a mortgagor to pay the mortgage tax invalidate the written stipulations for interest contained in the speech of a member in congress, advocating the passage of an Act, say: "These statements of the author of the Act in advocating its adoption cannot of course control its construction where there is doubt as to its meaning, but they show the condition of mining property in the public lands of the United States, and thus serve to indicate the probable intention of congress in the passage of the Act." In Am. Net & Twine Co. v. Worthington, 141 U. S. 473 (1891), the court, repeating that statements and opinions of the promoters of the Act in the legislative body are inadmissible as bearing on its construction, say that reference to the proceedings of the body may be made to inform the court of the exigencies of the fishing interests, and the reasons for fixing the duty at a certain amount. The report of the senate committee on Education and Labor, recommending the passage of the bill, is quoted by the court in Holy Trinity Church v. U. S., 143 U. S. 464 (1891), as throwing light on the intention of congress in passing it. This latter case has apparently not always been understood, for the court, in *In re* Downing, 56 Fed. Rep. 470 (1893), referring to it, say: "The case of Holy Trinity Church v. U. S. was apparently pressed upon its (the court's) attention as an authority for permitting courts to discard the language of a statute, and interpret its purpose by the supposed intention of the law-makers, gathered from general considerations of justice or expediency. That adjudication, according to our experience, has been invariably cited where the effort has been made to induce this court to legislate and substitute its own notions of what the law should be for the plainly expressed will of the legislative body. We do not understand, however, that it sanctions any new rules of statutory interpretation." From the foregoing examination of cases, it would seem that while the remarks of individual members and the proceedings of the legislature as a body cannot be referred to as a guide to the construction of an Act, they may sometimes be taken into account as a means of informing the court of collateral facts and circumstances which may tend to show more clearly the condition of public affairs that the Act was designed to ameliorate. Or in other words, they would be referred to only as a means (to use the language of the earlier statements of the Supreme Court) of recurring to "the situation and history of the country" in their relation to the Act under consideration.—*Yale Law Journal.*

BOOK REVIEWS.

AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, VOL. XXVI.

This volume the latest of a valuable and now well known series which is published by Edward Thompson Company, Northport, Long Island, contains many subjects of peculiar interest. Among them we notice particularly a well written paper on title, an article of one hundred and twenty-five pages on towns and townships, an exhaustive treatment of the important subject of trade-marks embracing nearly three hundred pages, valuable papers on trespass, trover and trust deeds.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Notice and Proofs of Loss.—A policy of accident insurance provided that, in case of death or injury, notice of claim should be given to the secretary of the company immediately after the accident, and positive proof of death should be furnished within six months thereafter, as conditions precedent: Held, that where the insured, a tugboat engineer, disappeared on November 9, 1892, and his body was found in the water near the tugboat on April 19, 1893, and notice of death was furnished May 26, 1893, and the proofs July 12, 1893, it showed a reasonable compliance with the terms of the policy.—KENTZLER V. AMERICAN MUT. ACC. ASS'N, Wis., 60 N. W. Rep. 1002.

2. ACCORD AND SATISFACTION — Assignment.—In an action on a note, defendant pleaded an assignment to plaintiff of certain property of greater value than the amount of the note, but failed to aver that the property assigned was accepted in satisfaction of the note: Held, that plaintiff, by a failure to demur, waived the defect in the plea.—OIL WELL SUPPLY CO. V. WOLF, Mo., 60 N. W. Rep. 167.

3. ACTION BY EXECUTORS—Set off.—In an action by executors to recover money paid by testatrix to cancel notes for defendant, who was her son, and who became a residuary legatee under her will, defendant cannot set off his interest in the estate without alleging a special legacy under the will, or show that the estate is solvent, and that plaintiffs have funds sufficient to pay his legacy after paying the debts of the estate.—WOESSNER V. WELLS, Tex., 28 S. W. Rep. 247.

4. ACTION—Joinder of Causes.—Under rule 4, governing practice in district courts, a plaintiff declaring in *assumpsit* for goods sold and delivered may also declare for an unlawful conversion thereof.—COMPTON V. ASHLEY, Tex., 28 S. W. Rep. 223.

5. ADMIRALTY—Jurisdiction—Injury on Wharf.—Admiralty has no jurisdiction of an action for injury to a

person on a wharf, caused by negligence originating on a ship; and it makes no difference that the person was employed as a seaman on the ship.—ANDERSON v. THE MARY GARRETT, U. S. D. C. (Cal.), 63 Fed. Rep. 1009.

6. ADVERSE POSSESSION.—Where the owner of the marsh land in dispute, who lived within 40 miles of it, abandoned it, and thereafter defendants' lessors, claiming title under a tax deed duly recorded, for 12 years paid the taxes, and occasionally cut hay thereon, and different lessees of the land for 12 years posted notices about the land, forbidding trespassers thereon, and employed a watchman to keep off trespassers, and it was understood in the neighborhood that said lessors were the owners, of said land, the possession of said lessors was adverse for that time.—WHITAKER v. ERIE SHOOTING CLUB, Mich., 60 N. W. Rep. 983.

7. APPEAL—Jurisdiction of Equity.—A declaration of trust and a subsequent will, making the same disposition of the property, were attacked on the ground of undue influence. A judgment was affirmed on appeal: Held, that a decree sustaining the trust should also be affirmed, as a reversal would be nugatory.—GARLAND v. SMITH, Mo., 28 S. W. Rep. 196.

8. ASSIGNMENT OF FUND—Securing Future Advances.—One who takes an assignment of the proceeds of notes in the hands of a bank for collection, as security for future advances to be made the assignor, cannot, as against a creditor of the assignor who garnishes the bank, collect from the bank the amount of advances made after notice of the garnishment. — FINNIGAN v. FLOECK, Tex., 28 S. W. Rep. 268.

9. ASSUMPSIT—Quantum Meruit.—One who contracts to furnish all the material for a building and fails to do so cannot recover on *quantum meruit*. — COHN v. PLUMER, Wis., 60 N. W. Rep. 1000.

10. BANKS—Trust Companies—Receipt of Deposit.—A trust company organized under Rev. St. 1889, ch. 42, art. 11, and its officers, are not within the provisions of Rev. St. 1889, § 3581, which forbid officers of any banking institution from receiving deposits when the bank or banking institution is insolvent, though such company has and exercises some of the functions of a bank.—STATE v. REID, Mo., 28 S. W. Rep. 172.

11. CANCELLATION OF DEED.—An infant who represents himself of age, and thereby induces one to purchase land of him, will be estopped by his fraudulent representations from calling on a court of equity to cancel the deed.—RYAN v. GROWNEY, Mo., 28 S. W. Rep. 189.

12. CARRIER—Passenger—Exemplary Damages.—If a passenger, aided and abetted by the conductor, uses excessive force in removing another passenger from the train, the company is liable for the resulting injuries. Where a railroad company ratifies the malicious act of its conductor in removing a passenger from a train with unnecessary force, it is liable for exemplary damages.—INTERNATIONAL & G. N. RY. CO. v. MILLER, Tex., 28 S. W. Rep. 233.

13. CARRIERS OF GOODS—Injury to Goods.—A common carrier, contracting for the safe conduct and delivery of certain merchandise, is not relieved from liability for its loss by the fact that its road was at the time in the possession of a receiver.—GULF, C. & S. F. RY. CO. v. INSURANCE CO. OF NORTH AMERICA, Tex., 28 S. W. Rep. 237.

14. CARRIERS OF PASSENGERS—Contract—Reasonable Regulations.—It is a reasonable regulation for a company operating direct, and indirect and circuitous, lines of roads between two points, to require that through passengers, traveling upon a simple contract to carry from one point to the other, should go by the most direct route.—CHURCH v. CHICAGO, M. & ST. P. RY. CO., S. Dak., 60 N. W. Rep. 854.

15. CONSTITUTIONAL LAW—Tax-Receivable Coupons.—Coupons from bonds issued under Acts Va. March 30, 1871, and March 28, 1879, bearing on their face the contract of the State that they should be received in payment of taxes, etc., are valid obligations of the State, receivable for taxes and dues to her, and when a tax payer, in person or by agent, tenders such coupons in payment of taxes due by him, and keeps his tender good, he will be considered to have paid the taxes, and will be protected in person and property from any effort of the State to enforce the tax.—PARSONS v. SLAUGHTER, U. S. C. C. (Va.), 63 Fed. Rep. 876.

16. CONTEMPT—Degree of Proof Required.—Accusations for contempt must be supported by evidence sufficient to convince the mind of the trior, beyond a reasonable doubt, of the actual guilt of the accused; and every element of the offense, including a criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts.—UNITED STATES v. JOSE, U. S. C. C. (Wash.), 63 Fed. Rep. 951.

17. CONTEMPT—Failure to Pay Costs.—Where, on an appeal from justice court, the Circuit Court ordered that unless the bond was amended, and the justice fees and an attorney fee were paid, within a certain time, the appeal be dismissed, the failure of appellant to pay such attorney fee is not contempt of court, and he cannot be committed under How. Ann. St. § 7260, providing for the enforcement of interlocutory orders.—LUCAS v. SWARTHOUT, Mich., 60 N. W. Rep. 973.

18. CONTRACT—Action for Breach.—One who refuses to perform the conditions imposed upon him by the terms of a contract cannot recover for a breach thereof by the other party.—CHICAGO, B. & Q. R. CO. v. COCKRAN, Neb., 60 N. W. Rep. 894.

19. CONTRACT — Parol Evidence.—Parol evidence is incompetent to prove a contemporaneous oral agreement by which it is sought to change or alter the terms of a written contract, and the result of which would be to change the effect of the written contract in a material portion of it and to insert or read into it a condition or reservation not contained in it or implied by its terms.—MATTISON v. CHICAGO, R. I. & P. R. CO., Neb., 60 N. W. Rep. 925.

20. CONTRACT—Part Performance—Part Payment.—If a person has advanced money in part performance of a contract and then refuses to proceed, the other party being ready and willing to perform on his part all the stipulations of the agreement, the former will not be permitted to recover back what he has advanced.—LEXINGTON MILL & ELEVATOR CO. v. NEUENS, Neb., 60 N. W. Rep. 893.

21. CORPORATION—Action by Receiver against Cashier.—In an action by the receiver of an insolvent banking association against its former cashier to recover a balance alleged to be in his hands, defendant may be required to submit an account, when this is necessary to ascertain the amount of said balance.—DUNN v. JOHNSON, N. Car., 20 S. E. Rep. 390.

22. CORPORATION — Member.—The holders of bank stock certificates, which stated that the shares were "transferable only on the books of the bank," on surrender of the certificate properly indorsed, sold, indorsed, and delivered such certificates to J. Bros. & Co., who were debtors of the bank. One of the latter firm, and also one of the sellers, notified the bank of the transfer; and the cashier made an entry on the stock certificate book—which was the only book kept showing who were stockholders—that the certificates were transferred to, and owned by J. Bros. & Co.: Held, that the firm of J. Bros. & Co. was a "member" of such corporation, within the meaning of Mansf. Dig. Ark. § 975, which provides that the stock of every corporation shall be transferred only on the books thereof, in such form as the directors prescribe, and such corporation shall "have a lien upon all the stock or property of its members" for all debts due from them to it.—BANK OF COMMERCE v. BANK OF NEWPORT, U. S. C. C. of App., 63 Fed. Rep. 898.

23. COUNTY — Issue of Bonds.—In the absence of statutory authority, a county has no power to issue bonds. — COLBURN v. CHATTANOOGA WESTERN R. CO., Tenn., 28 S. W. Rep. 298.

24. CRIMINAL CONVERSATION—Evidence of Husband.—In an action for criminal conversation with plaintiff's

wife, plaintiff cannot complain because evidence of what defendant had said about the frequency of his calls at plaintiff's home was excluded until it should be shown that defendant made such calls.—HANSELMAN v. DOVEL, Mich., 60 N. W. Rep. 978.

25. CRIMINAL EVIDENCE—Admissions.—In a prosecution for assault with intent to kill, defendant's statement, "I have fixed one of you, and I would just as soon fix three or four more of you as not," made immediately after committing the alleged offense, is not admissible as part of the *res gestæ*, but is admissible as an admission that defendant committed the deed, and also as tending to show ill will.—STATE v. SMITH, Mo., 28 S. W. Rep. 181.

26. CRIMINAL EVIDENCE—Bigamy.—Under Mill. & V. Code, § 5651, providing that on trial for bigamy, in the absence of a certified copy of the first marriage license, a "public acknowledgment" by the party charged shall be competent evidence of the first marriage, the acknowledgment need not be before a court or public tribunal, but may be made by a confession, or by conduct in the presence of others.—CRANE v. STATE, Tenn., 28 S. W. Rep. 317.

27. CRIMINAL EVIDENCE—Murder—Res Gestæ.—On a trial for murder, the exclamation of horror of a person made on the spot, in the presence of the victim, and while the assailants were just leaving their victim, and were yet in sight, and when the witness who heard the exclamation, the person who made it, the dying man, and the fleeing assailants were all within 50 feet of each other, is admissible as a part of the *res gestæ*.—STATE v. KAISER, Mo., 28 S. W. Rep. 182.

28. CRIMINAL EVIDENCE — Privileged Communications.—An attorney is a competent witness against his client as to all matters not privileged.—STATE v. HEDGEPETH, Mo., 60 N. W. Rep. 160.

29. CRIMINAL LAW—Bail Pending Appeal.—The right to give bail pending proceedings by petition in error in this court, after conviction for a felony, is not absolute, but rests in the discretion of the court.—FORD v. STATE, Neb., 60 N. W. Rep. 960.

30. CRIMINAL LAW—Bill of Exceptions.—Where a person convicted of a felony, escapes from jail it is proper for the trial judge to refuse to sign a bill of exceptions, though defendant has already appealed.—STATE v. LOGAN, Mo., 28 S. W. Rep. 176.

31. CRIMINAL LAW—Confinement of Minors.—Const. § 252, providing that the general assembly, as soon as practicable, shall provide for the establishment of an institution for the detention of all persons under the age of 18 years convicted of such crimes as may be designated by law, does not prevent incarceration in the penitentiary of such persons, where the legislature has failed to provide such institution.—WILLARD v. COMMONWEALTH, Ky., 28 S. W. Rep. 151.

32. CRIMINAL LAW—Embezzlement.—It is no defense to a charge of embezzlement that the money was collected by defendant as agent of a foreign corporation, which had not filed a copy of its charter in the office of the secretary of State, or caused an abstract thereof to be recorded in the register's office, as required by Laws 1891, ch. 122.—STATE v. O'BRIEN, Tenn., 28 S. W. Rep. 311.

33. CRIMINAL LAW—Murder—Insanity as Defense.—An irresistible impulse is not an excuse for the commission of a crime, where the person committing it is capable of knowing right from wrong.—WILCOX v. STATE, Tenn., 28 S. W. Rep. 312.

34. CRIMINAL LAW—Quashing Indictment.—The fact that defendant was taken before the grand jury, and there testified to facts criminative of himself, is not a ground for quashing an indictment.—MENCHECA v. STATE, Tex., 28 S. W. Rep. 208.

35. CRIMINAL LAW—Robbery.—In one count of the information for murder the accused was charged with having purposely and of his deliberate and premeditated malice killed the deceased, and in two other counts the killing is alleged to have been done in an attempt to rob the deceased: Held, to charge but one offense, and a motion to require the State to elect between the several counts of the information was properly overruled.—HILL v. STATE, Neb., 60 N. W. Rep. 916.

36. CRIMINAL LAW—Sufficiency of Verdict.—Where the offense charged consists of degrees, the jury should state in their verdict the degree in which they find the accused guilty; and where the information charged aggravated assault, and the verdict read: "We, the jury, find the defendant guilty, and assess his fine at ten dollars,"—it is too indefinite to form the basis of a judgment.—HAYS v. STATE, Tex., 28 S. W. Rep. 203.

37. CRIMINAL PRACTICE—Larceny—Value of Property.—In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence.—EDMONDS v. STATE, Neb., 60 N. W. Rep. 957.

38. DEED—Subscribing Witness.—Under Code 1858, § 2038, providing that, "to authenticate an instrument for registration, its execution shall be acknowledged by the maker, or proved by two subscribing witnesses," only those can be subscribing witnesses who are competent to testify in regard to the matter involved; so that, married women being at the time the statute was passed incompetent to testify with respect to any deed made by or to their husbands, a wife is not a competent subscribing witness to such an instrument.—THIRD NAT. BANK OF CHATTANOOGA v. O'BRIEN, Tenn., 28 S. W. Rep. 293.

39. DEPOSITION. — A deposition cannot be used in evidence against one made a party to the action after it was taken, without notice or an opportunity to cross-examine.—DALSHEIMER v. MORRIS, Tex., 28 S. W. Rep. 240.

40. EVIDENCE—Oral Evidence—Contract.— An order was sent to plaintiff by its agent to ship to defendant 100 boxes of soap, but the order did not state that a sale of the soap to defendant was made, and a place for the name of the purchaser was left blank. On the order was written, "Accepted," followed by defendant's name: Held, that parol evidence was admissible to show that the agreement was not for a sale to defendant, but for a delivery of the goods, to be turned over to another.—COLGATE v. LATTA, N. Car., 20 S. E . Rep. 388.

41. EVIDENCE—Parol Evidence. — Where a lumber dealer executed a deed of trust for the benefit of creditors, describing the property transferred as "all my stock of lumber of every class and kind, materials, fixtures, improvements, etc., used in connection with the business," parol evidence is admissible, in an action by the trustee against an attaching creditor, to show the character of the business and the articles of property used therein, in order to ascertain whether a stock of paints and oils were "materials," within the meaning of the trust deed.—ELLIS v. COCHRAN, Tex., 28 S. W. Rep. 243.

42. EVIDENCE—Parol Evidence — Assignment of Accounts."—Parol evidence is admissible so show that the word "accounts," as used in an assignment, for the purpose of security, of the "good and collectible accounts" of the assignor, covered not only such accounts as showed an unconditional liability on the part of the debtor at the date of the assignment, but also partially executed contracts and the consignment contracts which called for payment in the future and on conditions to be performed.—PRESTON NAT. BANK OF DETROIT v. EMERSON, Mich., 60 N. W. Rep. 981.

43. FEDERAL COURTS—Citizenship.—It is citizenship, and not the residence, of the party, that confers jurisdiction, and gives the right to sue in the Federal courts.—HASKELL v. BAILEY, U. S. C. C. of App., 63 Fed. Rep. 873.

44. FEDERAL COURTS—Partition.—A tenant in common who is out of possession, and who has been disseised by his cotenant, who is in possession of land,

claiming title to the whole of it, cannot maintain a bill for partition in the Federal courts until he has established his title and right of possession by a suit at law. —FREY V. WILLOUGHBY, U. S. C. C. of App., 63 Fed. Rep. 865.

45. FRAUDS, STATUTE OF—Parol Warranty.—A parol promise of the grantor of real estate to warrant and defend the title of his grantee is within the provisions of section 3, ch. 32, Comp. St., and therefore void.—KELLY V. PALMER, Neb., 60 N. W. Rep. 924.

46. FRAUDULENT CONVEYANCE.— Where a creditor sought to have a conveyance of certain property by the debtor husband to his wife set aside, alleging that it was made without consideration and in fraud of creditors, and defendants alleged that said transfer was made in payment of a pre existing debt due the wife from the husband for money loaned, the burden of proving fraud and no consideration is on the plaintiff; there being no presumption that said money belonged to the husband, and the wife not being required to show that she acquired said money in such a way as to make it her separate property.—RHODES V. WOOD, Tenn., 28 S. W. Rep. 294.

47. FRAUDULENT CONVEYANCES — Consideration. — Where the property conveyed by the trust deed to pay a preferred creditor is of less value than the debt secured, is immaterial, so far as the other creditors are concerned, how much fraud may have been intended by the grantor.—SCARBOROUGH V. HILLIARD, Tex., 28 S. W. Rep. 231.

48. FRAUDULENT CONVEYANCE — Consideration. — A purchase of property of an insolvent debtor, with intent to aid in hindering, delaying, or defrauding his creditors, is void as to such creditors, though a full consideration is paid for the property.—HEDRICK V. STRAUSS, Neb., 60 N. W. Rep. 928.

49. HABEAS CORPUS—Custody of Child.—Const. 1876, art. 5, § 8, giving District Courts power to issue writs of "*habeas corpus* in felony cases, *mandamus*, injunction, *certiorari* and all other writs necessary to enforce their jurisdiction," as amended by striking out the words "in felony cases," confers jurisdiction to issue the writ of *habeas corpus*, at the instance of parents, to determine their right to the custody of their minor child, which they had previously relinquished to another.—LEGATE V. LEGATE, Tex., 28 S. W. Rep. 281.

50. HOMESTEAD—Assignee for Creditors.—One who, on making an assignment for creditors, reserves a homestead, is entitled to have a lien on the land selected as a homestead paid by his trustee out of the assets of the estate; and if such land is sold under the lien he is entitled to procure a homestead out of the proceeds of other lands sold by the trustee.—GALYON V. GILMORE, Tenn., 28 S. W. Rep. 301.

51. HOMESTEAD—Intent—Evidence.—Where the question is whether certain premises which a party had formerly occupied constituted at that time his homestead or not, such party may be allowed to testify for what purpose and with what intention he used or occupied such premises at the time.—CLARK V. EVANS, S. Dak., 60 N. W. Rep. 862.

52. HUSBAND AND WIFE—Alimony—Equitable Jurisdiction.—A court of equity will entertain an action brought for alimony alone, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault.—COCHRAN V. COCHRAN, Neb., 60 N. W. Rep. 942.

53. HUSBAND AND WIFE—Competency as Witnesses.—In a suit by a husband against his wife to compel her to specifically perform a written contract she had made with him, in and by which she agreed to convey to him certain real estate, neither the husband nor the wife can testify, one against the other, in the case.—GREENE V. GREENE, Neb., 60 N. W. Rep. 937.

54. INJUNCTION.—Equity will not enjoin the prosecution of replevin for logs on the ground that the title of the plaintiff in that action is based on a void tax deed and on fraudulent tax receipts for the redemption of the land from which the logs were taken, since plaintiff may set up such fraudulent title as a defense in that action.—WOLF RIVER LUMBER CO. V. BROWN, Wis., 60 N. W. Rep. 996.

55. INSURANCE — Authority of Insurance Agent.—Plaintiff employed an insurance agent to keep certain property continually insured for a certain amount, part of the insurance being taken in companies represented by the agent, and part through other companies. To avoid the frequent sending and returning of the policies as some were canceled by the different companies, all of the policies were left with the agent: Held, that the agent had authority to receive, for the insured, notices of cancellation of policies. — SCHAUER V. QUEEN INS. CO. OF AMERICA, Wis., 60 N. W. Rep. 994.

56. INSURANCE COMPANY—Action for Assessments.—In a suit by a mutual insurance company organized under the laws of this State against one of its members for assessments levied against him to pay loses of the insurance company, the fact that the auditor of the State had refused the insurance company a certificate of authority to continue doing business in the State is not a defense, as the refusal of the auditor was only a prohibition upon the insurance company from taking new risks.—BURMOOD V. FARMERS' UNION INS. CO., Neb., 60 N. W. Rep. 905.

57. INSURANCE—Mortgage Clause—Additional Insurance.—The provision, in a mortgage clause of a fire policy, that the insurer "shall not be liable under this policy for a greater portion of any loss than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein," requires the mortgagee to prorate with all policies on the property, and is not limited to policies covering his interest, notwithstanding a prior general provision in the mortgage clause that "this insurance, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor or owner."—HARTFORD FIRE INS. CO. V. WILLIAMS, U. S. C. C. of App., 63 Fed. Rep. 925.

58. INSURANCE—Proof of Loss—Arbitration. — A demand by an insurance company for arbitration in the manner provided in its policy, under which there has been a loss by fire, waives formal proofs of the loss.—HOME FIRE INS. CO. V. BEAN, Neb., 60 N. W. Rep. 907.

59. INTOXICATING LIQUORS—Nuisance.—In an indictment under section 13 of the prohibition statute, which declares all places to be common nuisances where intoxicating liquors are sold or kept for sale in violation of the provisions of the act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, it is not necessary, when it is charged that intoxicating liquors were so sold, to state the names of the parties to whom such sales were made.— STATE V. DELLAIRE, N. Dak., 60 N. W. Rep. 988.

60. INTOXICATING LIQUORS — Original Packages.—Where bottles of intoxicating liquor were each inclosed in a paper wrapper or box, which was sealed with sealing wax, and a number of the paper boxes, each containing a flask of such liquor, were packed in a wooden box by a party in St. Louis, Mo., and shipped to his agent at Republican City, Neb., and the agent opened the wooden box, and took the paper boxes in which the flasks of liquor were contained therefrom, and sold them separately, held, that the wooden box was the "original package," and not the sealed paper box or wrapper, and bottle therein inclosed; and such a sale was a violation of the provisions of the law of this State regulating the license and sale of malt, spirituous, and vinous liquors.—HALEY V. STATE, Neb., 60 N. W. Rep. 962.

61. INTOXICATING LIQUORS— Sales to Minors.— One who sells intoxicating liquor to a minor, though innocently ignorant of the fact, violates and incurs the penalty of the law, notwithstanding the purchaser makes an affidavit that he is over the age of 21 years. While good faith and honest intention constitute no defense, evidence of that character should be consid-

ered in mitigation of the penalty.—STATE v. SASSE, S Dak., 60 N. W. Rep. 853.

62. JUDGMENT AGAINST RAILROAD— Priorities. — Under Act S. C., Feb. 9, 1882, declaring that a judgment against a railroad company for personal injuries shall take precedence of a mortgage to secure bonds, such a judgment will not take precedence of a mortgage given before the act, but will of one given thereafter, and before the injury for which judgment is obtained. —PHINIZY v. AUGUSTA & K. R. Co., U. S. C. C. (S. Car.), 63 Fed. Rep. 922.

63. LANDLORD AND TENANT—Assignment of Lease.— Where, in an assignment of a lease there is no agreement by the assignor to put the assignee in possession of the leased property, oral evidence is not admissible to show that prior to the execution of the assignment the assignor made such an agreement.—BOYD v. PAUL, Mo., 28 S. W. Rep. 171.

64. LANDLORD AND TENANT— Lease— Alteration.—A, the owner of land, demised the same to B, reserving as rent one fourth of the crops. B sublet a portion of the premises to C for a money rent. C paid a portion of the rent to B, and thereafter paid the remainder to B's administratrix. The administratrix paid the latter sum to A, who accepted the same: Held, that the payment to and acceptance by A of the money operated as a relinquishment of any interest he might have had in the crop raised on the land sublet to C and evidenced a new contract between A and B's administratrix, whereby, as to this land, a money payment was to be received in lieu of rent in kind.—CONNER v. SCHRICKER, Neb., 60 N. W. Rep. 891.

65. LIFE INSURANCE POLICY—Right of Recovery.— Where a partner obtains a policy of insurance on his life, payable to himself and his partner, or their administrators or assigns, the premium on which is paid out of the partnership assets, and afterwards, on the dissolution of the partnership, conveys all his interest in the firm property to his partner, and afterwards dies, the continuing partner, having no interest in the life of insured at the time of the latter's death, cannot recover on the policy, as against the estate of the insured.—CHEEVES v. ANDERS, Tex., 28 S. W. Rep. 274.

66. LIMITATIONS — Accrual of Cause of Action.—The defendant promised to pay on June 1, 1885, the amount of two notes, with interest, given to plaintiff in payment for certain land, and if he sold land before June 1st, then he "agreed to pay said amount, with interest up to the time of sale." Said land was sold on February 14, 1885: Held, that the cause of action on the notes accrued when said sale was made.—SEVIER v. CARSON, Tex., 28 S. W. Rep. 224.

67. LIMITATIONS — Accrual of Cause of Action—Nuisance.—Where defendant railroad company dug a ditch on its right of way, and neglected to provide an outlet for it, so that water collected there, thus lessening the value of a farm by rendering it unhealthy, limitations commenced to run when the deterioration in value of the farm began.—GULF, W. T. & P. R. Co. v. GOLDMAN, Tex., 28 S. W. Rep. 267.

68. LIMITATION OF ACTIONS—Claims against State.— The statute of limitations applies to claims against the State.—COWLES v. STATE, N. Car., 20 S. E. Rep. 384.

69. MASTER AND SERVANT—Injuries to Employee.—A physician cannot recover from an employer for services rendered an injured employee, unless engaged by the employer to render the services.—MALONE v. KNICKERBOCKER ICE Co., Wis., 60 N. W. Rep. 999.

70. MECHANIC'S LIEN — Property Subject.—The mechanic's lien law of this State requires that a contract for material, labor, etc., for an improvement on real estate shall be made with the owner thereof, or his agent; and a tenant of real estate, because of his tenancy, is not the agent of his landlord, in such a sense as to render the latter, or his real estate, liable for materials furnished the tenant, and used by him in erecting improvements on such real estate.—MOORE v. VAUGHN, Neb., 60 N. W. Rep. 914.

71. MECHANIC'S LIEN — Sufficiency of Claim.—The primary purpose of the filing of a claim for mechanic's lien under section 5476, Comp. Laws, being to give notice, the sufficiency of such claim in form and substance, as against subsequent incumbrancers without actual notice, depends upon its notice-giving quality. —LAIRD-NORTON CO. v. HOPKINS, S. Dak., 60 N. W. Rep. 857.

72. MECHANIC'S LIEN—Waiver.—A mechanic's lien on machinery furnished a corporation is not waived by taking its note for the purchase price, secured by personal indorsements.—SMITH & VAILE CO. v. BUTTS, Miss., 16 South. Rep. 242.

73. MORTGAGE—Description of Debt.—Where a mortgage describes the debt secured merely by references to a note of even date, and payable on a certain day, though the amount of the note is not given, the description is sufficiently definite.—HARPER v. EDWARDS, N. Car., 20 S. E. Rep. 392.

74. MUNICIPAL CORPORATIONS—Defective Sidewalk—Ice.—The failure of a city to remove ice from a sidewalk within a reasonable time after notice of its condition renders it liable to a person injured thereby.— KOCH v. CITY OF ASHLAND, Wis., 60 N. W. Rep. 990.

75. MUNICIPAL CORPORATION — Public Nuisance— Damages.—In an action against a city for damages for the maintenance of a public nuisance, which caused sickness in plaintiff's family, the court submitted to the jury the issues whether the city carelessly suffered a public nuisance to be created by failure to keep a ditch in repair, and, if so, what damage has the plaintiff sustained "thereby," and also instructed that, to entitle plaintiff to recover, the sickness must have been directly caused by the condition of the ditch: Held, that it was proper to refuse to submit, at defendant's request, the issue whether the sickness was "the result of the condition of the ditch alone," as such issue was necessarily embodied in those given.—DOWNS v. CITY OF HIGH POINT, N. Car., 20 S. E. Rep. 335.

76. MUNICIPAL IMPROVEMENTS—Preliminary Assessments.—Laws 1889, ch. 27, provides that before any contract for street improvements is made a preliminary assessment is to be made by the board of public works and reported to the common council for confirmation: Held, that a preliminary assessment made before the contract is let is essential to the validity of an assessment to pay for the improvement.—STATE v. MAYOR, ETC., OF CITY OF ASHLAND, Wis., 60 N. W. Rep. 1001.

77. NEGLIGENCE — Evidence.—In an action for the death of plaintiff's husband, caused by defects in a wooden bridge over which defendant's cars were run, evidence showing that, after the accident, defendant constructed an iron bridge in its stead is inadmissible as an admission of negligence.—SAN ANTONIO & A. P. RY. CO. v. LYNCH, Tex., 28 S. W. Rep. 252.

78. NEGLIGENCE — Obstruction of Passageway.—One who negligently places obstructions in the hall of a building is liable to an employee of a tenant of the building who is injured thereby, since such obstruction constitutes a breach of the duty of the owner to keep such hallway open to the use of the tenants.— CRANE ELEVATOR CO. v. LIPPERT, U. S. C. C. of App., 63 Fed. Rep. 942.

79. NEGOTIABLE INSTRUMENT—Note—Pleading.—Under section 4927, Comp. Laws, a complaint in an action upon a promissory note by payee against maker is sufficient if it set out a copy of the note, and state that there is due plaintiff thereon from the adverse party a specified sum, which plaintiff claims.—SCOTT v. ESTERBROOKS, S. Dak., 60 N. W. Rep. 850.

80. NEGOTIABLE INSTRUMENTS—Notice of Protest.— An accommodation maker and indorser of a negotiable note released from liability by failure of the holder to give notice of non-payment and protest of the note are not bound by a subsequent promise to waive notice and pay the note, if the sole consideration for the promise is their former liability.—SEBREE DEPOSIT BANK v. MORELAND, Ky., 28 S. W. Rep. 153.

81. NEGOTIABLE INSTRUMENT—Signature on Note.—Where a promissory note is signed by one at the lower right-hand corner, where a maker usually signs, and by another at the lower left hand corner, where a wit ness usually signs, but without words of attestation, parol evidence is admissible to show that the latter signed as a witness, and not as a maker.—AULTMAN & TAYLOR CO. v. GUNDERSON, S. Dak., 60 N. W. Rep. 859.

82. NEGOTIABLE NOTE — Assignment without Recourse.—In a suit for the amount of a forged note sold to plaintiff by defendant, based, in one count, on the implied warranty that the note was genuine, and, in another, on the want of consideration for the purchase price thereof, where plaintiff is required to elect between the two counts, and she proceeds on the former one, a judgment against her thereon is no bar to the reinstatement of the other count and a trial thereon.—WARE v. MCCORMACK, Ky., 60 N. W. Rep. 157.

83. PARTNERSHIP — Pleading.—An action may be maintained against H L S and G W S, partners, doing business as S & S, or against either of them; but, to render G W S liable for the acts of H L S, there should be averments, as well as evidence, to establish between them the relation of partners.—STONE v. NEELEY, Neb., 60 N. W. Rep. 965.

84. PAYMENT TO ATTORNEY.—The delivery of a certificate of deposit indorsed in blank to an attorney, for his client in his client's presence, has the same effect as payment as if the delivery were to the client.—DUQUETTE v. RICHAR, Mich., 60 N. W. Rep. 974.

85. PLEADING—Demurrer—Answering Over.—Answer ing over after the overruling of a general demurrer to the petition is no waiver of the defect that the petition fails to state a cause of action.—COX v. PEORIA MANUF'G CO., Neb., 60 N. W. Rep. 933.

86. PRINCIPAL AND AGENT — Unauthorized Act of Agent.—Where it was known to the president of a bank that the indorsement of the name of the payee on a note by one assuming to make such indorsement as the payee's agent was outside the scope of his powers, such indorsement is not binding on the alleged principal.—DIETZ v. CITY NAT. BANK OF HASTINGS, Neb., 60 N. W. Rep. 896.

87. RAILROAD COMPANY — Accident—Negligence.—In an action against a railroad company for wrongful death, where the evidence raised the question of contributory negligence on deceased's part a charge defining deceased's duty as to exercising care, but not stating what effect his failure to observe such duty would have on plaintiff's rights, was defective, and did not supply the place of an instruction fairly present ing the question of contributory negligence and its effects.—INTERNATIONAL & G. N. R. CO. v. NEFF, Tex., 28 S. W. Rep. 283.

88. RAILROAD COMPANY—Fires.—Where plaintiff has shown that his property was destroyed by fire from defendant's engines, and that he could not have put it out by exercising ordinary care, and defendant has not shown that the engines were equipped to prevent the escape of fire, as required by law, it is not error to charge that plaintiff can recover, without submitting the question of defendant's negligence.—CAMPBELL v. GODWIN, Tex., 28 S. W. Rep. 273.

89. RAILROAD COMPANY—Injury—Negligence.—Where a railroad passenger is injured by the derailment of a train at a place where the track and train are entirely under the control of the company, a presumption of negligence arises, and the company must show that at the time of the accident it was exercising the utmost care and foresight reasonably compatible with the prosecution of its business, in order to escape liability.—MEXICAN CENT. RY. CO. v. LAURICELLA, Tex., 28 S. W. Rep. 277.

90. RAILROAD COMPANY — Injury to Trespasser on Track.—Where the plaintiff was injured by a locomotive of the defendant at a place on defendant's track where such plaintiff had no right to be, and where in fact she was a trespasser, the jury were properly instructed that the engineer was under obligations, as soon as he discovered that plaintiff was on the track, to use all possible means and efforts consistent with the safety of his train and any passengers or persons who might be thereon to avoid injuring the plaintiff, and failing so todo would render the company liable.—OMAHA & R. V. R. CO. v. COOK, Neb., 60 N. W. Rep. 899.

91. RAILROADS—Surface Water—Destruction of Crop.—The value, at the time of destruction by surface water turned from its course by improper construction of a railroad, of several growing crops, may be recovered, though a crop is raised thereafter in the same season on the same land.—GALVESTON, H. & S. A. RY. CO. v. PARR, Tex., 28 S. W. Rep. 264.

92. RECEIVERS — Removal.—It is no ground of re moval of receivers of a mortgage company that they are acting as selling agents of trustees of mortgages executed by the company to secure its debentures; the power to sell the mortgages resting with the trustees, and not being controlled by the court or receivers as such.—FOWLER v. JARVIS-CONKLIN MORTG. CO. U. S. C. C. (N. Y.), 63 Fed. Rep. 889.

93. RELEASE — Death by Wrongful Act.—A release given, for a valuable consideration, to the person liable, by those entitled, under Gen. St. 1878, ch. 77, § 2, to the benefit of the amount recoverable for death caused by a wrongful act, is a bar to a subsequent action brought by the personal representative of the deceased.—SYKORA v. J. I. CASE THRESHING MACH. CO., Minn., 60 N. W. Rep. 1008.

94. REPLEVIN BETWEEN MORTGAGES—Judgment.—In replevin, it appeared that both parties were mortgagees, but that plaintiff's mortgage was a prior lien. The jury found the value of the property, and that it was wrongfully detained by defendants: Held, that defendants are not entitled to a money judgment against plaintiff for their lien without first tendering to plaintiff the amount of the prior lien.—OLIN v. LOCKWOOD, Mich., 60 N. W. Rep. 972.

95. REPLEVIN FOR PROPERTY SOLD.—The assignee of the business and accounts of a firm may bring replevin for goods sold by the firm, on credit, under false repre sentations as to the vendee's responsibility.—REEDER BROS. SHOE CO. v. PRYLINSKI, Mich., 60 N. W. Rep. 969.

96. REPLEVIN — Possession.—Where parties litigant had entered into a contract under which the possession of a stock of merchandise was transferred from plaintiff to defendants on a sufficient independent consideration, plaintiff could not found a superior right of possession, such as would entitle him to maintain replevin for said stock, upon an alleged breach of said contract by defendants as to retaining plaintiff in their employ at a certain rate of compensation thereby fixed.—SHACKELFORD v. HARGREAVES, Neb., 60 N. W. Rep. 951.

97. REPLEVIN — Value of Diamond.—In an action to replevy a diamond, which is in possession of defendant, who refuses to produce it on the trial, testimony by plaintiff, that the diamond was of a certain weight, color, and quality, followed by the testimony of a jeweler that such a diamond would be worth a certain sum, and other testimony as to the value of diamonds by weight, is sufficient to prove the value of the diamond.—DAVENPORT v. ABBOT, Tex., 28 S. W. Rep. 218.

98. SALE BY BANK OFFICERS—Warranty.—A bank is not liable for the representations of its officers on a sale of bonds in which the officers were individually interested, and in which the bank had no interest, though the officers used the funds and credit of the bank to consummate the sale.—RUOHS v. THIRD NAT. BANK OF CHATTANOOGA, Tenn., 28 S. W. Rep. 303.

99. SALE OF ARTICLE TO BE MANUFACTURED.—Breach of an oral promise by plaintiff's agent not to se l his wares to merchants in the same town, other than defendant, will not justify defendant in rescinding a con-

tract of purchase made through such agent.—TUFTS v. WEINFELD, Wis., 60 N. W. Rep. 992.

100. SALE OF GOODS — Damages for Breach of Warranty.—Plaintiff undertook to fill defendant's order for a certain grade of apples, but shipped a very inferior grade, and the persons who had agreed to purchase the apples from defendant refused to accept them on discovering their condition. Defendant, after notifying plaintiff as to their condition, sold them at public sale: Held, that such sale did not prevent defendant from recovering of plaintiff such damages as he had sustained by plaintiff's failure to ship the grade ordered.—TRIPIS v. GAMBLE, Tex., 28 S. W. Rep. 244.

101. SALE OF LIVE STOCK — Validity.—Rev. St. art. 4562, providing that a sale of certain animals, accompanied by delivery, is *prima facie* illegal, unless accompanied by a bill of sale, is directory, and the presumption of illegality may be rebutted.—SWAN v. LARKIN, Tex., 28 S. W. Rep. 217.

102. SALE—Conditional Sale—Release of Lien.—Where a vendor obtains personal judgment against his vendee for a piano sold conditionally, with a stipulation that the instrument should remain the property of the vendor until the amount due and any judgment rendered thereon, is paid in full, title to the property does not pass upon the vendor obtaining such judgment.—FULLER v. BYRNE, Mich., 60 N. W. Rep. 980.

103. SCHOOL DISTRICT—Presumption as to Legality.—After a school district has exercised the franchises and privileges thereof for the period of one year, its legal organization will be conclusively presumed, whatever may have been the defects and irregularities in the formation or organization of such district.—STATE v. SCHOOL DIST. NO. 19. SIOUX COUNTY, Neb., 60 N. W. Rep. 912.

104. SLANDER—Forgery.—A statement that a person is a "forger" is not slander, actionable *per se* where such word is coupled with a charge of some specific act, which of itself does not constitute forgery.—BARNES v. CRAWFORD, N. Car., 20 S. E. Rep. 386.

105. SPECIFIC PERFORMANCE.—In an action for specific performance of contracts where plaintiff alleges that he is the maker of a note, and has paid $200 dollars thereon, which defendant, the payee, refuses to indorse or to receipt for, as he promised, but is attempting to transfer such note to an innocent purchaser; that said note will not be due for six years,—and prays judgment that defendant may be commanded to make such indorsement, and render such receipt, or that an alternative judgment of $200 be rendered against defendant, plaintiff shows that he is entitled to relief.—KOPPLIN v. KOPPLIN, Tex., 28 S. W. Rep. 220.

106. STATUTES— Amendment.—Where it is sought by legislative enactment to amend and repeal a former act, or any section or sections thereof, there should be a compliance with requirements of the constitution in reference to amendment and repeal of laws.—CITY OF SOUTH OMAHA v. TAX-PAYERS' LEAGUE, Neb., 60 N. W. Rep. 957.

107. SUNDAY LAW—Sale — Validity.—Where parties meet on Sunday, and talk over, and substantially agree upon the terms of, a purchase and sale of a pair of horses, during which representations are made by the seller which would constitute a warranty of soundness, and then agree that they should meet again on the next day, when secured notes should be given for the purchase price, and the horses then transferred to the purchaser, which was done, the warranty took legal effect, as such, only when the trade was completed and the property in the horses passed to the purchaser, and was not void, as a Sunday contract.—EVERT v. KLEIMENHAGEN, S. Dak., 60 N. W. Rep. 851.

108. TAXATION—Liability of Collector.—Where a tax collector deposited the city's money in a bank of good credit, where it was subsequently lost through the suspension of said bank, he is liable therefor, though the mayor and finance committee of the city council, in their official capacity, but without authority, directed such deposit, and agreed to discharge the collector from liability if said bank became insolvent.—ADAMS v. LEE, Miss., 16 South. Rep. 243.

109. TAX DEEDS — Execution by Collector. — Under Laws of 1872, art 17, providing that the county treasurer shall be *ex officio* county collector, with power to collect taxes and sells lands for non-payment thereof, a tax deed executed as collector merely, and not as county treasurer, is void upon its face.—CALLAHAN v. DAVIS, Mo., 60 N. W. Rep. 162.

110. TAX SALE—Validity.—A county treasurer cannot make a valid public or private sale of real estate for non-payment of delinquent taxes due thereon, unless in such sale are included all taxes, with interest and costs, then delinquent against such real estate.—ADAMS v. OSGOOD, Neb., 60 N. W. Rep. 869.

111. TELEGRAPH COMPANY— Damages.—A telegraph company is liable to the addressee of a telegram, on failure to deliver within a reasonable time a telegram notifying him not to ship cattle to a certain market, for loss caused by a shipment to such market.—WESTERN UNION TEL. CO. v. LINNEY, Tex., 28 S. W. Rep. 234.

112. TENANCY IN COMMON—Conveyance.—Where one tenant in common conveys a certain portion of the common property by description, the others may, by ratifying the sale, charge the former with the proceeds of the sale, and, without making the vendees parties to the action, sue for a partition of the remainder.—NEW YORK & T. LAND CO. v. HYLAND, Tex., 28 S. W. Rep. 206.

113. TROVER—Exemption.—Where one brings trover for exemptions, the joinder of his partner as plaintiff is fatal to the action.—ROGERS v. RAYNOR, Mich., 60 N. W. Rep. 980.

114. TRUST—Parol.—Where, in a suit to enforce an express trust, counsel admit, on argument of a demurrer to the complaint, that it was not created by a written instrument, the demurrer is properly sustained, though the complaint does not affirmatively show such fact.—THOMPSON v. MARLEY, Mich., 60 N. W. Rep. 976.

115. USURY—Recovery of Penalty—Limitations.—The limitation of two years, within which an action, under the provisions of section 5198, Rev. St. U. S. may be commenced for the recovery from a national bank of twice the amount of usury paid to it, dates from the actual payment of such interest, and not from the bank's reservation of it from the original loan by way of discount.—SMITH v. FIRST NAT. BANK OF CRETE, Neb., 60 N. W. Rep. 866.

116. WILL CONTEST—Evidence. — A proceeding to contest a will is an action at law in which the parties are entitled to a trial by jury, and, if they waive a jury the judgment of the court will not be disturbed as being contrary to the weight of the evidence.—GARLAND v. SMITH, Mo., 28 S. W. Rep. 191.

117. WILLS—Probate by Clerk.—Under Rev. St. 1889, § 8880, allowed the clerk of the Probate court to take proof of wills in vacation, subject to confirmation by the court, the action of the clerk in admitting a will to probate is of no avail until so confirmed; and where an order confirming such action was afterwards vacated the will is not admissible to support plaintiff's title in ejectment.—SNUFFER v. HOWERTON, Mo., 60 N. W. Rep. 166.

118. WITNESS — Competency—Husband and Wife.—Under 3 How. St. § 7546, providing that a wife shall not be examined as a witness against her husband without his consent, a wife, when garnished in an action against the husband, cannot testify against her husband's objections.—BERLES v. ADSIT, Mich., 60 N. W. Rep. 967.

119. WRONGFUL ATTACHMENT—County.—A county is not liable for damages growing out of its wrongful attachment of property.—REED v. HOWELL COUNTY, Mo., 28 S. W. Rep. 177.